

ABSTRACT

Aggravated Circumstances, Reasonable Efforts, and ASFA

This article seeks to identify circumstances that justify a state's refusal to provide reasonable efforts to reunite parents with their abused or neglected children. While the article focuses on the "aggravated circumstances" exception to the federal reasonable efforts requirement, it offers an analytical approach useful to any decision-maker charged with protecting the health and safety of an abused or neglected child.

Since 1980, federal legislation has explicitly required states receiving federal foster care dollars to make reasonable efforts to reunite parents with children removed because of abuse or neglect. In 1997, Congress responded to widespread concerns that these efforts were responsible for children being returned to unsafe homes or being left in foster care limbo. Congress's response, the Adoption and Safe Families Act of 1997 (ASFA), identifies three exceptions to the reasonable efforts requirement, one of which is aggravated circumstances. This article uses the aggravated circumstance exception to identify situations where reunification efforts should be denied.

ASFA's exceptions, including aggravated circumstances, recognize the harm that results from making efforts to reunite in situations not appropriate for reunification. The reasonable efforts provision recognizes the harm that results from disrupting the parent-child relationship. To best protect a child against both of these harms, a court should first consider all relevant circumstances, including the effects of the parental conduct, any derivative harm to the child, and any remedial efforts by the parents. Before denying reasonable efforts to reunite, the court should also determine that the past or current harm or parental conduct is sufficient to trigger an ASFA exception; determine that reunification efforts are likely to inflict a very serious harm – either a return to a dangerous home or a stay in foster care that is too long; and identify a nexus between the triggering harm and the predicted harm.

Aggravated Circumstances, Reasonable Efforts, and ASFA

by Kathleen S. Bean*

The Adoption and Safe Families Act (ASFA)¹ was signed into law more than ten years ago, in 1997. With ASFA, Congress sought to achieve several objectives concerning children who are abused, neglected, or abandoned by their parents.² As its name suggests, one was to increase the number of adoptions for these children. Increasing adoptions, however, was less a primary goal than it was a means of serving and complementing the underlying objective of the Act reflected in the “safe families” part of the name. Foremost, Congress sought to shift the pendulum of the child protection system, away from what many saw as an unreasonable emphasis on family preservation, and towards permanency and thus health and safety for the children.

Congress was specifically concerned with a provision in the earlier Adoption Assistance and Child Welfare Act of 1980 (AACWA)³ that required states receiving

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¹ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 671 et seq. (2000)).

² For a comprehensive overview of ASFA *see generally* David J. Herring, *The Adoption and Safe Families Act – Hope and Its Subversion*, 34 FAM. L.Q. 329 (2000); *see also* Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95 (1999); Dorothy E. Roberts, *Is There Justice in Children’s Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA J. CONST. L. 112 (1999).

³ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

federal foster care funding to make “reasonable efforts” to reunite families with children removed from their homes because of abuse or neglect. ASFA’s legislative history reveals a widespread perception, by Congress and others, that reasonable efforts had become unreasonable, resulting in a system that was out of balance. States appeared to be too focused on efforts to return abused and neglected children to their homes, thus endangering children in the name of family preservation.

Returning children to homes made safe, and doing so quickly, does protect the children, of course; it minimizes the psychological damage that can come from disrupting the parent-child relationship.⁴ Returning children to homes that are not yet safe, however, does not. Nor does requiring children to wait in foster care for years, while efforts are expended in an attempt to make their homes safe.⁵ For a child in one of these situations, health and safety often means adoption by a new family.⁶

⁴ See Robert M. Gordon, *Drifting through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 653 (1999) (noting that studies show disrupting the parent-child relationship can harm children of all ages, “causing psychological difficulties, antisocial behavior, and low achievement.”).

⁵ *Id.* at 646-48.

⁶ See, e.g.:

This bill addresses the frustrating problem of how to promote adoption of foster children who through no fault of their own are unable to return to their natural parents and who have languished for far too long in the foster care system. It is time to stop the revolving door of foster care that sends children from home to home to home with little or no hope that they will live with the same families from one month to another. . . . H.R. 867 places the safety and well-being of children above efforts by the state to reunite them with biological parents who have abused or neglected them. 143 CONG. REC. H2012-06, H2013 (daily ed. April 30, 1997) (statement of Rep. Pryce). See also Susan Vivian Mangold, *Transgressing the Border Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System*, 36 NEW ENG. L. REV. 69, 93-95 (2001) (discussing ASFA’s “shift away from reunification and toward adoption”).

To better protect these children, Congress attempted to clarify AACWA's reasonable efforts requirement. A key part of this clarification was to single out a handful of circumstances where efforts to reunite were *not* required. States were granted discretion to bypass reasonable efforts when a parent had committed murder or voluntary manslaughter of another child of the parent; when a parent had been complicit in such a murder or manslaughter, or an attempted murder or manslaughter; when a parent had committed a felony assault resulting in serious bodily injury to the child or another child of the parent; and when the parent's rights to a sibling of the child had been terminated involuntarily.⁷ One additional circumstance was more ambiguous, however. Under ASFA, "reasonable efforts to reunite children with their parents" are not required if "the parent has subjected the child to *aggravated circumstances* (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse)."⁸

Providing states with the explicit discretion to deny reasonable efforts when circumstances indicate children cannot safely be reunited with their parents within a reasonable time should result in protecting children. ASFA's aggravated circumstances exception, however, by itself, fails to provide a meaningful basis for distinguishing the cases for which reasonable efforts should be bypassed. A representative of the Children's Defense Fund, MaryLee Allen, warned of this danger in an early hearing on the provisions of ASFA,⁹ when addressing legislative efforts to clarify the reasonable efforts provision:

⁷ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D)(ii), (iii) (2000)).

⁸ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D)(i) (emphasis added).

⁹ ASFA was originally introduced as the Adoption Promotion Act of 1997, H.R. 867, 105th Cong. (1997), in the House Ways and Means Committee by Representatives Dave Camp (Mich.), Barbara B. Kennelly (Conn.), and E. Clay Shaw (Fla.). Katherine A. Hort, *Is*

“Congress must proceed cautiously so as to not create new problems by using terms that are subject to numerous interpretations (such as ‘aggravated circumstances’) or widening the arc of pendulum swings in an area of policy that is already too volatile for children’s well-being.”¹⁰ Similarly, shortly after ASFA was enacted, Sheila Harrigan, Executive Director of the New York Public Welfare Association, warned that New York needed to statutorily define “aggravated circumstances,” to give courts some direction for when bypassing reunification efforts should be considered.¹¹ “Otherwise, much time, effort[], and money will be wasted before case law [will] slowly begin to define the concept of aggravated circumstances.”¹²

Further, the impact to the health and safety of children when reunification efforts are not required can be tremendous. As noted by a New York family court, it ends the state’s “responsibility to provide services,” it ends the “duty to facilitate and encourage visitation,” and it “almost inevitably places the parent just steps away from termination of parental rights.”¹³ Without reasonable efforts, the opportunity to address the problems that

Twenty-Two Months Beyond the Best Interest of the Child? ASFA’s Guidelines for the Termination of Parental Rights, 28 *FORDHAM URB. L.J.* 1879, 1893-94 (2001).

¹⁰ *Hearing on The Adoption Promotion Act of 1997, House Ways and Means Subcommittee on Human Resources*, 105th Cong. 49 (1997) (statement of MaryLee Allen, Director Child Welfare and Mental Health Division, Children’s Defense Fund). Allen noted most all of the cases to which child protection workers are assigned present health and safety concerns; “the challenge for the worker in interpreting the reasonable efforts provision is to decide when services or other efforts can reasonably prevent these health and safety concerns from endangering the child.” *Id.*

¹¹ Margaret A. Burt, *Public Interest Workshop Track*, in James R. Bell & Jane M. Spinak, *CHILDREN’S LAW INSTITUTE* 314-315 (Practising Law Institute 1998).

¹² *Id.* at 314. “It is very likely that case law definition would also result in uneven definition across the state, which would be unfair to children and families. Everyone involved should be on fair notice of what egregious abusive actions may result in a court ruling that efforts will not be made to reunite the family.” *Id.* at 314-315.

¹³ *In re Jaime S.*, 798 N.Y.S.2d 667, 672 (N.Y. Fam. Ct. 2005) (noting that without services and visitation provided for the parent, “there is little, if any, hope for reunification.”).

contributed to the child's removal and to work towards reunification, which will avoid the damage that comes from disrupting the parent-child relationship, is remote.¹⁴ The vagueness of the aggravated circumstances exception thus contributes to the likelihood that life-altering decisions are susceptible to arbitrariness, capriciousness, and discrimination. At the least, the phrase invites inconsistent and thus unpredictable decisions about when a state should expend efforts to reunite a child with his or her parents.

The aggravated circumstance exception was written in anticipation of decisions to forego reasonable efforts at the outset of dependency cases. Decisions on whether a state should discontinue reasonable efforts once begun, however, encompass the same question: Based on what we know about this child and these parents at this time, will reunification efforts so threaten the child's health or safety that we should forego or discontinue those efforts? By examining, in detail, the aggravated circumstance exception, I hope to contribute to a more systematic approach that will help the judges, lawyers, and social workers responsible for answering this question.¹⁵

My analysis of ASFA's aggravated circumstance exception first chronicles what seems fairly apparent, the purpose of Congress in passing ASFA. This includes a quick

¹⁴ See Christine P. Costantakos, Neb. Juv. Ct. Law & Prac. § 10.2(D)(1), NEB. PRAC. SERIES VOL. IV (West 2008); see also *In re Interest of Jac'quez*, 669 N.W.2d 429, 435 (Neb. 2003) (noting that "dispensing with reasonable efforts at reunification frequently amounts to a substantial step toward termination of parental rights").

¹⁵ A 2002 GAO report says that limited data suggests that some judges are reluctant to allow the state to bypass reunification efforts. See United States General Accounting Office, *Foster Care: Recent Legislation Helps State Focus on Finding Permanent Homes for Children, but Long-Standing Barriers Remain*, GAO-02-585 Adoption and Safe Families Act, 24-25 (2002), <http://www.gao.gov/new.items/d02585.pdf> (reporting "some judges believe that parents should always be given the opportunity to reunify with their children"). There should be reluctance. But with a better understanding of what should constitute aggravated circumstances, and why, judges may be more willing to deny reasonable efforts when necessary to protect the health and safety of the child.

review of the 1980 AACWA and its reasonable efforts provision, along with a more detailed discussion of the related provisions of ASFA. I then look at the legislative history of ASFA, with a particular focus on reasonable efforts and the aggravated circumstances exception. At the same time I examine the case law and especially those cases that have made pointed efforts to define aggravated circumstances.

Ultimately I conclude that decisions to deny reasonable efforts must be based on more than the existence of past or current “aggravated circumstances.” A decision to deny reasonable efforts must articulate how the circumstances predict a sufficiently serious harm to the child before the court should reunification efforts be attempted. While I offer an analytical approach for these cases, I have no neat and tidy solution for the individuals who must ultimately make these difficult decisions. I hope, however, that my discussion will contribute to the health and safety of the children in the dependency system.

As I have previously stated, I do make certain assumptions when writing in this area,¹⁶ all of which are consistent with ASFA: first, as specifically provided by ASFA, a child’s health and safety must be paramount;¹⁷ second, as is implicit in ASFA, preserving the parent-child relationship presumptively contributes to a child’s health and safety;¹⁸

¹⁶ Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 322-323 (2005).

¹⁷ ASFA § 305(b), 42 U.S.C. § 629b(a)(9) (2000) (providing that state plans must “contain[] assurances that . . . the safety of the children to be served shall be of paramount concern”).

¹⁸ See Roberts, *supra* note 2, at 117 (stating “[c]hildren have an interest in maintaining a bond with their parents and other family members and are terribly injured when this bond is disrupted. The reason for limiting state intrusion in the home, therefore, is not only a concern for parental privacy, but also the recognition that children suffer when separated from their parents and community.”); see also Gordon, *supra* note 4, at 652-654 (noting the reasonable efforts provision in AFSA minimizes the chances children will suffer a harmful separation from their parents); *Ex Parte D.J.*, 645 So. 2d 303, 305 (Ala. 1994) (citing *Striplin v. Ware*, 36 Ala. 87 (1860) (stating “[t]he law devolves the custody of infant

third, some parents are so harmful to their children that “the harm outweighs the presumptive benefit of the parent-child relationship”;¹⁹ and finally, children are usually harmed by the very nature of a long and indefinite stay in foster care.²⁰ Each of these assumptions can conflict with another, however, and identifying an analytical approach that yields consistent and appropriate results for abused and neglected children is the challenge.

I. Background: State Legislative and Judicial Responses to ASFA

Because ASFA explicitly charged the states with the task of defining aggravated circumstances,²¹ a quick survey of state legislative and judicial responses to this delegation provides a helpful context for this discussion.

children upon their parents, not so much upon the ground of natural right in the latter, as because the interests of the children, and the good of the public, will, as a general rule, be thereby promoted.”).

¹⁹ Gordon, *supra* note 4, at 654-55) (noting “an abusive parent assaults psychological as well as physical health, ultimately destroying the child’s ability to feel safe, wanted, and loved”); *see also In re J.W.*, 578 A.2d 952, 958 (Pa. Super. Ct. 1990) (“When parents act in accordance with the natural bonds of parental affection, preservation of the parent-child bond is *prima facie* in the best interest of the child, and the state has no justification to terminate that bond. On the other hand, a court may properly terminate parental bonds which exist *in form* but not *in substance* when preservation of the parental bond would consign a child to an indefinite, unhappy, and unstable future devoid of the irreducible minimum parental care to which that child is entitled.”)

²⁰ Gordon, *supra* note 4, at 655 (“Recent empirical work confirms . . . that long periods of multiple [foster] placements or ‘drift’ will be seriously harmful. Even in a loving, long-term foster home, the uncertainty of . . . foster care . . . may cause hardship.”) (internal footnote omitted); *see also In re DMH*, 736 A.2d 1261, 1270 (N.J. 1999) (concerning children who had been in long term foster care: “a delay in establishing a stable and permanent home will cause harm to both these children.”); Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children when Contradictory Policies Collide*, 9 WM. & MARY J. WOMEN & L. 413, 462 (2003) (noting the “potential negative consequences of foster care.”).

²¹ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D)(i) (2000) (“reasonable efforts . . . shall not be required . . . if the parent has subjected the child to aggravated circumstances (*as defined in State law*, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse) (emphasis added)).

State legislation. With some exceptions, state legislative definitions model the federal legislation by providing lists of circumstances or conduct that can constitute aggravated circumstances.²² Some closely adhere to the ASFA language and say no more, e.g., Georgia, allowing a bypass of reunification efforts when “[t]he parent has subjected the child to aggravated circumstances which may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse.”²³ Most include some version of the suggested examples included in the federal provision.²⁴ Beyond that, however, the legislation varies greatly and demonstrates the need for a focused inquiry on the meaning of aggravated circumstances.

Some listed provisions are very specific, e.g., North Dakota: reasonable efforts not required when the parent “[h]as been incarcerated under a sentence for which the latest release date is: (1) In the case of a child age nine or older, after the child's majority; or (2) In the case of a child, after the child is twice the child's current age, measured in days.”²⁵; and Utah: “The parent permitted the child to reside . . . at a location where the parent knew or should have known that a clandestine laboratory operation was located.”²⁶ Others are more encompassing, e.g., South Dakota: “Has subjected the child or another child to torture, sexual abuse, abandonment for at least six months, chronic physical, mental or emotional injury, or chronic neglect.”²⁷

²² See generally Child Welfare Information Gateway, *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children: Summary of State Laws* (2006), http://www.childwelfare.gov/systemwide/laws_policies/statutes/reunifyall.pdf.

²³ GA. CODE ANN. § 15-11-58 (2008).

²⁴ See generally Child Welfare Information Gateway, *supra* note 22.

²⁵ N.D. CENT. CODE § 27-20-02(3)(b) (2007).

²⁶ UTAH CODE ANN. § 78A-6-312 (3)(d)(i)(J) (2008).

²⁷ S.D. CODIFIED LAWS § 26-8A-21.1(3) (2003).

In addition, some of the qualifying circumstances are defined by parental conduct and some by the effect of the conduct on the child; some exceptions use both. States that include provisions requiring only that the parent has subjected the child to certain parental conduct include Missouri: no reasonable efforts required if the parent “subjected the child to a severe act or recurrent acts of physical, emotional or sexual abuse.”²⁸ Oklahoma, when including chronic drug abuse as a ground for denying reunification efforts, also did so without regard to the effect on the child: “The parent . . . of the child has a history of extensive, abusive and chronic use of drugs or alcohol and has resisted treatment for this problem during a three-year period immediately prior to the filing of the deprived petition which brought that child to the court's attention.”²⁹

On the other hand, many states refer to the effect of the circumstances, e.g., a South Dakota provision concerning chronic drug and alcohol abuse: reasonable efforts not required when the parent “[h]as a documented history of abuse and neglect associated with chronic alcohol or drug abuse.”³⁰ A Nevada provision similarly refers to the effect of the parental conduct: no reasonable efforts required when the parent “[c]aused the abuse or neglect . . . which resulted in substantial bodily harm to the abused or neglected child.”³¹ An Arizona provision requires an “injury”: no reasonable efforts required when “a child is the victim of serious physical or emotional injury by the parent.”³² A Florida provision encompasses result, specifically a threat of harm to the child or the child’s sibling: no reasonable efforts required when the parent has engaged in “egregious conduct” “that

²⁸ MO. ANN. STAT. § 211.183(7)(1) (2004).

²⁹ OKLA. STAT. ANN. TIT. 10 § 7003-4.6(13) (2007).

³⁰ S.D. CODIFIED LAWS § 26-8A-21.1(6) (2003).

³¹ NEV. REV. STAT. § 432B.393(3)(a)(2) (2006).

³² ARIZ. REV. STAT. § 8-846 (2007).

threatens the life, safety, or physical, mental, or emotional health of the child or the child's sibling."³³

Other states use "aggravated" as an adjective to suggest that the harm or detriment needs to be substantial, either inherently or in its effect, e.g., New Jersey: "subjected the child to aggravated circumstances of abuse."³⁴ North Carolina's statute also emphasizes the aggravated aspect: "[a]ny circumstance attending to the commission of an act of abuse or neglect which increases its enormity or adds to its injurious consequences, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse."³⁵

A number of states favor the fairly encompassing "subjected the child to" language of ASFA. Some provisions explicitly include circumstances involving another child or sibling; some do not. For example, Alaska's exception reads: "subjected the child to circumstances that pose a substantial risk to the child's health or safety; these circumstances include abandonment, sexual abuse, torture, chronic mental injury, or chronic physical harm."³⁶ South Dakota uses close to the same language, but includes "or another child" in addition to "the child."³⁷

Most state legislative provisions focus primarily on current or past conduct when defining aggravated circumstances and list various parental conduct, or the results of parental conduct, that qualifies. Many, however include a general provision or catch-all phrase and some of these focus on or explicitly encompass the future of the child before the

³³ FLA. STAT. § 39.521(1)(f)(2008) (incorporating by reference § 39.806(1)(f)-(i)).

³⁴ N.J. STAT. ANN. §§ 30:4C-11.2, 11.3 (2008).

³⁵ N.C. GEN. STAT. § 7B-101(2) (2007).

³⁶ ALASKA STAT. § 47.10.086(c)(1) (2006).

³⁷ S.D. CODIFIED LAWS § 26- 8A-21.1 (2003) ("subjected the child or another child to torture, sexual abuse, abandonment for at least six months, chronic physical, mental, or emotional injury, or chronic neglect if the neglect was a serious threat to the safety of the child or another child").

court. In effect, the statutes require the states to consider whether remediation will address the problems, e.g., New Mexico: “the efforts would be futile,”³⁸ and North Carolina: “Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.”³⁹ Connecticut provides that courts may terminate parental rights without reasonable efforts if the “parent is unable or unwilling to benefit from reunification efforts,”⁴⁰ and Arkansas allows bypass of reasonable efforts when “a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification.”⁴¹ Iowa requires the state to establish, in addition to physical or sexual abuse or neglect, that the “abuse or neglect posed a significant risk to the life of the child or constituted imminent danger to the child” and that there is “clear and convincing evidence that the offer or receipt of services would not correct the conditions which led to the abuse or neglect of the child within a reasonable period of time.”⁴²

Judicial responses. State courts have also contributed to the effort to define aggravated circumstances. How much and what they have said has been dictated in part by their legislative definitions, and the discussions vary accordingly. Opinions in two cases, however, one from an appellate and one from a trial court, illustrate some of the issues. In the first, *State v. Risland*,⁴³ the parents claimed the trial court had improperly relieved child

³⁸ N.M. STAT. ANN. § 32A-4-22(C)(1) (1999).

³⁹ N.C. GEN. STAT. § 7B-507(b)(1) (2007).

⁴⁰ CONN. GEN. STAT. ANN. § 17(a)-112(j)(1) (2006); *see also* CONN. GEN. STAT. ANN. § 17a-111b(b)(1) (incorporating by reference §17(a)-112(j)).

⁴¹ ARK. CODE ANN. § 9-27-303(6)(A) (2008).

⁴² IOWA CODE § 232.116(1)(i) (incorporated by reference in Iowa Code § 232.57(2)(b) (Supp. 2008)).

⁴³ *State v. Risland*, 51 P.3d 697 (Or. Ct. App. 2002).

protective services from making reasonable efforts to reunite the child and parents.⁴⁴ Judge David V. Brewer, writing for a unanimous panel of the Oregon Court of Appeals, found the circumstances to qualify for the state’s aggravated circumstances exception.⁴⁵ Brewer’s 2002 opinion illustrates various issues that arise in these cases and specifically the relationship of the aggravated circumstances to the future of the child before the court.

Risland involved a nine-year-old child, the youngest of three children.⁴⁶ The applicable Oregon statute defined aggravated circumstances as “including but not limited to” five specific or groups of circumstances, e.g., “the parent has subjected any child to intentional starvation or torture.”⁴⁷ It also included ASFA’s other discretionary exceptions, e.g., when there has been a prior involuntary termination of parental rights or when a parent has committed murder or involuntary manslaughter of another child.⁴⁸ The *Risland* facts did not fit into any of the enumerated examples, however, and the court was faced with defining aggravated circumstances generally.⁴⁹

The court initially focused on the operative phrase, examining first the meaning of “aggravate.” It looked at the dictionary definition – “to make worse, more serious, or more severe: INTENSIFY,”⁵⁰ – and additionally looked at the specifics listed in the statute.

⁴⁴ *Id.* at 703.

⁴⁵ *Id.* at 699, 706. While the Oregon Court of Appeals in *Risland* did not specifically refer to ASFA, the same court noted in a later decision that the Oregon legislature had adopted its aggravated circumstances provision in response to ASFA. *State v. Williams*, 130 P.3d 801, 804 (Or. Ct. App. 2006) (“In response to ASFA, the Oregon legislature enacted Senate Bill (SB) 408 (1999) . . . [which] sets out three categories of circumstances where a court may excuse . . . reasonable efforts. to make possible the child's return home . . .”).

⁴⁶ *Risland*, 51 P.3d at 699.

⁴⁷ *Id.* at 703.

⁴⁸ *Id.* at 703-04.

⁴⁹ *Id.* at 705.

⁵⁰ *Id.* (emphasis in original).

Relying on plain meaning and the canon of *ejusdem generis*,⁵¹ the court concluded that “aggravated” circumstances “are those involving relatively more serious types of harm or detriment to a child.”⁵²

The court then looked at the plain meaning of “circumstances,” “the total complex of essential attributes and attendant adjuncts,”⁵³ and concluded that a court could consider not only the parents’ conduct, but also the “results of those actions and conditions, including effects, direct and indirect” on the child.⁵⁴ The court also noted that the specifically enumerated circumstances in Oregon’s statute that could constitute aggravated circumstances “may be found in regard to ‘any’ child” and not only the child before the court. Thus the aggravated circumstances could be directly associated with a child other than the child before the court.⁵⁵

To decide the case before it, the court considered a number of circumstances, including the parents’ problems and conduct. The opinion noted the parents had a history of drug abuse – another child was born with methamphetamine in his system and the

⁵¹ *Id.* at 705 (“under [the] principle of *ejusdem generis*, the general category will partake of the same characteristics as the specifically enumerated examples”) (citing *State v. Johnston*, 31 P.3d 1101, 1104 (Or. Ct. App. 2001)). See Linda Jellum and David Charles Hricik, MODERN STATUTORY INTERPRETATION ch. 7 at 159 (Carolina Academic Press 2006), which explains *ejusdem generis*: “When general words in a statute precede or follow the designation of specific things . . . , the general words should be construed to include only objects similar in nature to the specific words.” The authors also note *ejusdem generis* is a species of another canon, *noscitur a sociis*.” *Noscitur a sociis* requires that “the meaning of words that are placed together in a statute should be determined in light of the words with which they are associated.” *Id.* at 151.

⁵² *Risland*, 51 P.3d at 705.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* The court also noted the Oregon legislature listed two “circumstances” that could involve the parent’s nonintentional conduct, specifically parental neglect resulting in a child’s death or serious physical injury. Accordingly, the court did not consider aggravated circumstances to be limited to intentional conduct by a parent toward a child.

mother was convicted of methamphetamine possession and driving under the influence;⁵⁶ the father had been convicted of several felonies, “including drug manufacture, weapons possession, and child neglect”; the father was also convicted of assault based on a domestic violence incident with his girlfriend;⁵⁷ and the children had also witnessed domestic violence between their mother and her boyfriend.⁵⁸ The court then looked at the effects of the conduct – the current and past harms – first, to a sibling, who had suffered “severe mental injury as a result of his exposure to significant domestic violence, the parents’ drug use, and a highly unstable home life.”⁵⁹ It then recounted the harms to the child before the court, noting that he had suffered “serious psychological and social damage including, among other disorders, posttraumatic stress disorder, oppositional defiant disorder, and parent-child relational disorder,” and that the “disorders were caused, in substantial part, by the parents’ conduct.”⁶⁰

The factor that seemed to distinguish the circumstances before the court as appropriate for an aggravated circumstances exception, however, was what the court deemed a second “aggravated” circumstance – that the parents’ harmful actions and conditions “persist[ed,] despite extensive efforts to remediate them *before* the court assumed jurisdiction.”⁶¹ Without explicitly doing so, the court, in effect, predicted that the child before the court would be harmed by reunification efforts because the parents’ prior

⁵⁶ *Id.* at 699.

⁵⁷ *Id.*

⁵⁸ *Id.* at 706.

⁵⁹ *Id.* at 705-06.

⁶⁰ *Id.* at 706.

⁶¹ *Id.* (emphasis in original).

failures predicted future failures. The court thus concluded the trial court was authorized to allow the child protection agency to deny reasonable reunification efforts.⁶²

The Oregon Court considered a fairly typical statute in a fairly logical manner. It also had before it a not atypical set of facts for an abuse and neglect case. To distinguish a situation that might not otherwise fit within the aggravated circumstances exception, however, the court emphasized not only the conduct of the parents and how it contributed to the serious problems of the child, but also that attempts to remediate the parents' problems had failed in the past.⁶³

A 2005 Delaware family court decision similarly discusses how reliance on past or current circumstances – here the narrow fact of prior involuntary terminations of parental rights – can be insufficient when sorting out cases for which reasonable efforts may be inappropriate. In *In re Division of Family Services v. Smith*,⁶⁴ the Delaware child protection agency asserted the involuntary termination of parental rights exception as a basis for denying reasonable efforts for a mother who had two earlier terminations, in 2001 and 2002.⁶⁵ The particular focus of the trial court was a separation of powers issue and whether the agency or the court had the authority to make the decision to pursue, or not, reasonable efforts.⁶⁶ In the course of its discussion, however, the court expressed concern about a prior involuntary termination being used to deny reasonable efforts in a current case, indicating that such a waiver might effectively result in denying parental rights to a

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *In re Div. of Fam. Servs. v. Smith*, 896 A.2d 179 (Del. Fam. Ct. 2005).

⁶⁵ *Id.* at 187-88.

⁶⁶ *Id.* at 189-90.

parent who “has instituted major positive changes . . . between the first involuntary termination of the child and subsequent court proceedings involving another child.”⁶⁷

Similar to the Oregon court’s opinion in *Risland* and its focus on the failure of prior efforts to remediate problems, the Delaware family court decision implicitly acknowledges that prior terminations of parental rights are considered relevant to the reasonable efforts decision because a parent’s prior failures presumably predict future failure.⁶⁸ Thus, attempting to reunite a child with a parent who has a prior involuntary termination will likely cause harm to the child involved in the reunification efforts. Like the Oregon court, however, the Delaware court noted that relying on a past circumstance, without considering additional and relevant present circumstances, could result in a denial of reasonable efforts when such efforts would be appropriate: “If this case involved circumstances in which [the parent] . . . had now improved considerably her parenting skills and ability to provide adequate and loving care to her child, this Judge might” have to reach a different conclusion.⁶⁹ “However,” noted the court, “the mother in this particular action is not such a parent”⁷⁰

Both the Oregon appellate and the Delaware trial court opinions reflect the core issue concerning any discretionary exception to the reasonable efforts requirement, that is the likelihood of harm to the child before the court and specifically the harm that may result from an attempt to reunite the child with his or her parents. This same concern is evident in the legislative history of ASFA.

⁶⁷ *Id.* at 189.

⁶⁸ *Id.* at 190.

⁶⁹ *Id.*

⁷⁰ *Id.*

II. Congressional Intent and Legislative Context for ASFA's

“Aggravated Circumstances”

The meaning of the aggravated circumstances exception is plain in at least one respect – that Congress meant states to provide their own definitions.⁷¹ Further, while the language of the exception provides some examples, it also states that aggravated circumstances “need not be limited” to these examples. The legislative history emphasizes this. For example, United States Senator Mike DeWine from Ohio:

Mr. President, let me point out now very carefully so there is no risk of misinterpretation on this floor The authors of this legislation do not – do not – intend these specified items to constitute an exclusive definition of which cases do not require reasonable efforts to be made.

Rather, these are examples – these are just examples – of the kind of adult behavior that makes it unnecessary, that makes it unwise, makes it simply wrong for the Government to make continued efforts to send children back to their care. This is not meant to be an exclusive list. We make this clear in the text of the bill.⁷²

Additional understanding, however, requires a closer look. And while the specific language of the aggravated circumstances exception is instructive, some of the broader aspects of ASFA, along with its related legislative history, provide the better beginning for identifying how decision-makers can single out the parent-child relationships for which states should be able to deny reunification efforts. These include ASFA's emphasis on the health and safety of the child, ASFA's retention of the “reasonable efforts” requirement, and the immediate legislative context of the aggravated circumstances exception.

⁷¹ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D) (2000) (“aggravated circumstances (as defined in State law [D])”).

⁷² 143 CONG. REC. S12668-03, S12670 (daily ed. Nov. 13, 1997).

A. The Health and Safety of the Child under ASFA

“[I]n determining reasonable efforts to be made . . . , the child’s health and safety shall be the paramount concern.”⁷³ Thus begins ASFA’s “Clarification of the Reasonable Efforts Requirement.” Congress’s determination to make paramount the health and safety of children in dependency proceedings has been consistently recognized by the state courts since ASFA’s enactment, including those that deal with dependency issues daily. One Connecticut trial court judge called ASFA’s “health and safety shall be paramount” clause the “mantra” of ASFA.⁷⁴ A New York Family Court judge referred to “ASFA’s unequivocal statement of public policy that children must be protected from depraved parental conduct.”⁷⁵ And a Delaware Family Court judge repeatedly referred to the health and safety provision of ASFA when discussing the legislation: “[C]hildren’s safety . . . must be the paramount concern of all child welfare decision-making. . . . [T]he safety of the child and the child’s need for permanency are the foremost concern To stress the importance of the safety principle, ASFA states explicitly that child health and safety is the paramount consideration.”⁷⁶

Legislative history underscores the strength of Congress’s resolve to protect the health and safety of children and also identifies the ways in which Congress perceived

⁷³ ASFA § 101(a), 671(a)(15)(A).

⁷⁴ *In re Sheneal*, 728 A.2d 544, 552 (Conn. Super. Ct. 1999) (Foley, J.).

⁷⁵ *In re Custody & Guardianship of Marino S.*, 693 N.Y.S.2d 822, 834 (N.Y. Fam. Ct. 1999) (Schechter, J.) [hereinafter *Marino Fam. Ct.*], *aff’d*, 741 N.Y.S.2d 207 (N.Y. S. Ct. 2002), *aff’d*, 795 N.E.2d 21 (N.Y. 2003). The Court’s opinion noted the “impact of [] ASFA’s mandates is so obvious that the Superior Court of Pennsylvania was influenced by it in a Termination of Parental Rights case decided even before that state passed its implementing legislation.” *Id.* at 843 n.9 (citing *In Interest of Lilley*, 719 A.2d 327 (Pa. Super. Ct. 1998)).

⁷⁶ *In re Rasheta D.*, 2000 WL 1693157 at *20 (Del. Fam. Ct. 2000) (Ableman, J.) (not reported in A.2d).

those health and safety issues were created or exacerbated. Two concerns repeatedly surface. First, it was believed that required reunification efforts were resulting in children being returned to dangerous homes, homes that “present[ed] too great a risk”⁷⁷ to the health and safety of the children. Second, required reunification efforts were also seen as being responsible for too many children spending too many years in foster care while states made “fruitless attempts to reunify . . . families that simply cannot be fixed.”⁷⁸ Ironically, the second of these concerns, lengthy stays in foster care, was a motivating factor in the initial adoption of the reasonable efforts provision.⁷⁹

1. AACWA and Reasonable Efforts

The phrase “reasonable efforts” first found a spot in the Adoption Assistance and Child Welfare Act of 1980 (AACWA),⁸⁰ when Congress responded to concerns about “foster care drift”⁸¹ and “foster care limbo.”⁸² Both were familiar terms in the debate about

⁷⁷ 143 CONG. REC. H10776, H10788 (daily ed. Nov. 13, 1997).

⁷⁸ *Improving the Well-Being of Abused and Neglected Children, Before the Senate Comm. on Labor & Human Resources*, 104th Cong. 1 (1996) [hereinafter *Abused and Neglected Children Hearing*] (statement of Senator DeWine).

⁷⁹ See generally Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 224 (1990):

Before passing [AACWA], Congress heard testimony over a five-year period about our country's treatment of abused and neglected children and their families. The most striking fact presented was the astonishing number of children who were being removed from their families and placed in foster care, many for the entire duration of their childhoods. . . . While lost in a system that could neither return them to their families nor place them with adoptive parents, these children often moved from foster home to foster home, becoming more and more disturbed with each move.

⁸⁰ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.) (1980). See Bean, *supra* note 16, at 321.

⁸¹ See Barbara Bennett Woodhouse, *Horton Looks at the ALI Principle*, 4 J. L. & FAM. STUD. 151, 158 (2002):

when the states should pursue adoptions for abused and neglected children and when the states should attempt to reunite these children with their parents. AACWA was designed to address the prevailing belief that states were placing too many children in foster care and leaving them there, failing to make sufficient efforts to reunite those children with their families.⁸³ AACWA thus required states receiving federal foster care funding to make reasonable efforts to keep children in their homes, and, if removal was necessary, to make reasonable efforts to return the children to their homes.⁸⁴ While, true to its name⁸⁵ – AACWA included provisions supporting adoption⁸⁶ – the thrust of the Act was keeping children with their families. States were thus required to provide “child welfare services,”⁸⁷ which were defined in a way that made keeping children with their families

Typically, [foster families] are urged to avoid becoming too attached or allowing the child to become too attached, so as to avoid disrupting bonds with the biological family with whom the child will be reunited. . . .

Many [foster] children have spent the bulk of their lives moving from temporary foster placement to foster placement – a syndrome critics have described as “foster care drift.” These children suffer developmental and emotional damage from a loss of trust in adults and from a lack of stability and continuity.

⁸² Sherry A. Hess, Note, *Texas Family Code Section 263.401: Improving the Mandatory Dismissal Deadline to be Truly in the Best Interest of the Child*, 9 TEX. WESLEYAN L. REV. 95, 98 (2002) (internal footnote omitted):

Foster care limbo refers to the existence of children who live in foster care for lengthy periods of time. Limbo results when a foster care child cannot be safely returned home; yet he or she is not free for adoption because the state has not terminated the parent-child relationship.

⁸³ See Shotton, *supra* note 79, at 223-25.

⁸⁴ AACWA at § 101(a)(1).

⁸⁵ *Adoption Assistance and Child Welfare Act*, Pub. L. No. 96-272, 94 Stat. 500 (emphasis added).

⁸⁶ AACWA at § 101(a)(1).

⁸⁷ *Id.*

presumptive and primary.⁸⁸ The health and safety of children, beyond general references to protecting the welfare of children, were not explicitly mentioned.⁸⁹

For a while, AACWA appeared to succeed as the number of children in foster care decreased.⁹⁰ By 1997, however, when ASFA was enacted, the number had returned to the level it was in 1977, three years prior to AACWA.⁹¹ As the numbers rose, many in the child protective services field expressed concerns to Congress, most of which were pegged to AACWA's reasonable efforts requirement.⁹² Some argued the reasonable efforts requirement was not the problem, but rather that the services provided to the families were inadequate "due to chronic under-funding and mismanagement of child welfare agencies

⁸⁸ AACWA at § 101(a)(1). The Act defined "child welfare services: to mean: public social services which are directed toward the accomplishment of the following purposes: (A) protecting and promoting the welfare of all children . . . ; (B) preventing or remedying or assisting in the solution of problems which may result in, the neglect [or] abuse . . . of children; (C) *preventing the unnecessary separation of children from their families by . . . preventing breakup of the family where the prevention of child removal is desirable and possible; (D) restoring to their families children who have been removed, by the provision of services . . . ; (E) placing children in suitable adoptive homes, in cases where restoration to the biological family is not possible or appropriate; and (F) assuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot be placed for adoption.*

Id. (emphasis added).

⁸⁹ *Id.*

⁹⁰ Shotton, *supra* note 79, at 224 (citing The Edna McConnell Clark Foundation, KEEPING FAMILIES TOGETHER: THE CASE FOR FAMILY PRESERVATION 1 (1985)) (noting a foster care population as high as 502,000 in 1977); Stephanie Jill Gendell, *A Reflection on the First Three Years of the Adoption and Safe Families Act Implementation*, 39 Fam. & Conciliation Cts. Rev. 25, 27 (2001) (citing Thomas P. McDonald et al., ASSESSING THE LONG-TERM EFFECTS OF FOSTER CARE: A RESEARCH SYNTHESIS 15 (Child Welfare League of America, Inc. 1996)) (reporting that the foster care population was 276,000 in 1985)).

⁹¹ Gendell, *supra* note 90, at 25.

⁹² Celeste Pagano, *Adoption and Foster Care*, 36 HARV. J. ON LEGIS. 242, 243 (1999). The Department of Health and Human Services did adopt regulations listing services that could be provided for reasonable efforts, but the regulations did not define what constituted "reasonable."

and courts.”⁹³ In effect, they argued that states were failing to comply with the reasonable efforts provision.⁹⁴ More influential with Congress, however, were charges that reunification efforts were being pursued at the expense of the children’s safety or psychological well-being,⁹⁵ resulting in children continuing to be left in foster care for too long and children being returned to unsafe homes.⁹⁶

2. The Concerns about Reasonable Efforts

As early as 1993, four years before ASFA was signed into law, Congress held hearings on “reasonable efforts.”⁹⁷ During these hearings and throughout ASFA’s legislative journey, Congress heard from and responded to witnesses concerned that reunification efforts were being made in situations where it was unreasonable – where

⁹³ Harvard Law Review Ass’n, *Unified Family Courts and the Child Protection Dilemma*, 116 HARV. L. REV. 2099, 2114 (2003); see also Theresa Glennon, *Walking With Them: Advocating for Parents With Mental Illnesses in the Child Welfare System*, 12 TEMP. POL. & CIV. RTS. L. REV. 273, 278 (2003) (“[advocates for parents] argued that the family services provided were often inadequate or of poor quality” and “social supports to keep a family together were not available.”).

⁹⁴ See, e.g., *Suter v. Artist M.*, 503 U.S. 347, 347-348 (1992) (plaintiffs, child beneficiaries under AACWA, brought suit seeking declaratory and injunctive relief against state officials arguing that the state had failed to provide reasonable efforts to prevent removal of children from their homes and to reunite families where children had been removed; the Court ruled the plaintiffs had no enforceable private right under the reasonable efforts provision of AACWA).

⁹⁵ See Michael J. Bufkin, *The “Reasonable Efforts” Requirement: Does it Place Children at Increased Risk of Abuse or Neglect?*, 35 U. LOUISVILLE J. FAM. L. 355, 374 (1997) (“Ironically, the emphasis on family preservation means abused children linger in foster homes while social workers try to repair hopelessly dysfunctional families.”).

⁹⁶ See Deborah L. Sanders, *Toward Creating a Policy of Permanence for America’s Disposable Children: The Evolution of Federal Funding Statutes for Foster Care from 1961 to Present*, 17 INT’L J.L. POL’Y & FAM. 211, 222 (2003) (Courts were criticized for refusing to remove children from their sometimes dangerous homes because reasonable efforts had not been made to keep the children there, as well as for refusing to terminate parental rights when reasonable efforts to reunite had not been made. The former resulted in children being left in homes where they might be harmed; the latter resulted in children being left in foster care, “without the hope of a plan for permanency.”)

⁹⁷ E.g., *Hearing on The Adoption Promotion Act of 1997, House Ways and Means Subcommittee on Human Resources*, 105th Cong. (1997).

homes could never be made safe for children. Always the concerns were two: returning children to unsafe homes and keeping children in foster care for too long.

Among those appearing before Congress were Connie Binsfeld, then Michigan's Lieutenant Governor, and Peter Digre, then Director of the Los Angeles County Department of Children and Family Services. Binsfeld told Congress that states were making reasonable efforts in "egregious" situations, that children were either being left in dangerous homes or "they [are] taken out of the home and put in foster care and delayed and delayed in foster care while all of the services to rehabilitate the parents [are] going on."⁹⁸ Digre argued to committee members in the House of Representatives that "[t]he word 'reasonable' is often read out of 'reasonable efforts[,] creating a situation in which children are placed in danger and re-abused in the name of family preservation In short, we too often engage in 'futile efforts' which are inherently unreasonable"⁹⁹ Digre talked about foster care as "tragically unstable" and urged Congress to "[r]ecognize . . . that there are classes of parents for whom 'reasonable efforts' and family preservation and reunification are or may be inherently unreasonable."¹⁰⁰ Examples provided by Digre included "parents who kill or maim children," "parents who aggressively sexually assault children," "parents with histories of violent criminal behavior," "parents who abandon

⁹⁸ *Barriers to Adoption, Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 104th Cong. 37 (1996) [hereinafter *Barriers to Adoption*] (statement of Gov. Binsfeld) (Binsfeld also stated it "would be very helpful to the States if [Congress would] define 'reasonable efforts.'").

⁹⁹ *Barriers to Adoption, supra* note 98, at 114 (statement of Peter Digre Director L.A. County Dep't of Children & Family Services).

¹⁰⁰ *Id.* at 116.

children in life-threatening circumstances,” and “parents with long-term and chronic addictions.”¹⁰¹

Helen Leonhart-Jones, then Executive Director of Montgomery County (Dayton), Ohio Children Services, also noted “there are some parents for who[m] all our best efforts will never be enough,” and argued for “clearly identified criteria which allow[] the professionals [to bypass reasonable efforts] for [those parents.]”¹⁰² Leonhart-Jones, like others, listed certain situations that so clearly fit these criteria that they should be exempt from reunification efforts, e.g., “parents with histories of violent criminal behavior or domestic violence.”¹⁰³

Members of Congress responded with like concerns and commentary. Congressman Tim Roemer talked about the “two major problems” in the foster care system: “[Too often we] reunite our children with their families only to find catastrophe to happen later on that week or that month when that child was abused again The second problem is now we have too many children languishing in foster care situations.”¹⁰⁴ Senator John H. Chafee, a cosponsor of the early Senate version of ASFA,¹⁰⁵ identified the twofold goals of his bill when he introduced it: to “ensure that abused and neglected children are in safe settings, and to move children more rapidly out of the foster care

¹⁰¹ *Id.*

¹⁰² *Abused and Neglected Children Hearing, supra* note 78, at 52 (statement of Helen Leonhart-Jones, Executive Director of Montgomery County (Dayton), Ohio Children Services).

¹⁰³ *Id.*

¹⁰⁴ 143 CONG. REC. H2012-06, H2018-19 (daily ed. April 30, 1997).

¹⁰⁵ The Safe Adoptions and Family Environments Act, S. 511, 105th Cong. (1997), was an earlier version of ASFA. *See* 143 CONG. REC. S2654-01, S2701 (daily ed. Mar. 20, 1997).

system and into permanent placements.”¹⁰⁶ Senator DeWine, a self-proclaimed strong and early supporter of legislation to clarify reasonable efforts,¹⁰⁷ referred frequently to the problem of foster care limbo and returning children to dangerous homes – problems he saw as exacerbated by the reasonable efforts requirement.¹⁰⁸ DeWine also talked about social workers’ concerns and perceptions that reunification efforts were still required, “even when . . . everybody with any common sense would know there is not one chance in a million that we are ever going to be able to fix that family.”¹⁰⁹

In addition, witnesses and members of Congress alike related accounts or referenced news reports of heartbreaking stories of children removed from foster homes prematurely and of children who suffered horrific crimes or died by the hands of or in the care of parents to whom the states had returned them. Child advocate Helen Leonhart-Jones told of a seven-year-old boy she worked with in Cincinnati, who died after falling from a third story window while he was at home, unsupervised, with his three-year-old

¹⁰⁶ 143 CONG. REC. S2654-01, S2701 (daily ed. Mar. 20, 1997). The bill excepted several situations from the requirement of reasonable efforts: where the parent has committed a CAPTA criminal act; where the parent is found “to have abandoned, tortured, chronically abused, or sexually abused the child”; and where returning the child to the home would “endanger the child’s health or safety.” It also acknowledged that states could specify the cases where, “because of circumstances that endanger the child’s health or safety,” no reasonable efforts were required. *Id.* at 2702 (section 102 of the bill).

¹⁰⁷ DeWine was a cosponsor of S. 511, the Safe Adoptions and Family Environments Act, 105th Cong. which was introduced March 20, 1997. 143 CONG. REC. S2654-01 (daily ed. Mar. 20, 1997). Just a month before, on Feb. 27, 1997, the house bill that eventually became ASFA, the Adoption Promotion Act of 1997, H.R. 867, 105th Cong. 1997, was introduced by Representatives Dave Camp and Barbara B. Kennelly. *Encouraging Adoption: Hearing Before the Subcommittee on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 4 (1997); see also Pagano, *supra* note 92, at 242 (stating that Representative E. Clay Shaw was also a co-sponsor).

¹⁰⁸ E.g., 143 CONG. REC. S11175-02, S11175 (daily ed. Oct. 24, 1997); 143 CONG. REC. S10262, S10262-63 (daily ed. Oct. 1, 1997).

¹⁰⁹ *Barriers to Adoption*, *supra* note 98, at 13-14.

brother.¹¹⁰ Representative Barbara Kennelly referred to “the terrible, heartbreaking case with little Emily in Michigan” and “other cases across these United States, headlines telling us the very worst can happen.”¹¹¹ Senator John Chafee pointed to the notorious abuse and death of Sabrina Green¹¹² and Senator DeWine related the tragic story of Elisa Izquierdo.¹¹³ Both girls’ families were being monitored by child protective services at the time of their deaths.¹¹⁴ Sabrina’s body “was found with fractured skull and a gangrenous severed thumb.”¹¹⁵ *Time Magazine* reported the police as saying about Elisa, “there was no part of the six-year-old’s body that was not cut or bruised.”¹¹⁶ And child advocate David Gelles’s *The Book of David* is credited with “galvaniz[ing] support for ASFA.”¹¹⁷ The book tells the story of David, whose sister had been removed from the home because of severe abuse by David’s parents. David was also reported, twice, as abused, but was left with his

¹¹⁰ See, e.g., *Abused and Neglected Children Hearing*, *supra* note 78, at 52 (testimony of Helen Leonhart-Jones, Executive Director of Montgomery County (Dayton), Ohio Children Services).

¹¹¹ 143 CONG. REC. H2012-06, H2017 (daily ed. Apr. 30, 1997).

¹¹² 143 CONG. REC. S12526-02, S12526 (daily ed. Nov. 13, 1997).

¹¹³ *Barriers to Adoption*, *supra* note 98, at 10-11.

¹¹⁴ Emily Bazelon, Note, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. POL’Y REV. 155, 183-84 (1999).

¹¹⁵ *Id.* at 183.

¹¹⁶ David Van Biema, *Abandoned to Her Fate*, TIME MAGAZINE (Dec. 11, 1995), <http://www.time.com/time/magazine/article/0,9171,983842,00.html>. *But see* Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden under Federal Child Protection Legislation*, 2 B.U. Pub. Int. L.J. 259, 274 (2003) (reporting that “Elisa’s family was never in a family preservation program, so the problem that led to her death was not attributable to attempts by the state to make reasonable efforts to preserve the family.”) (citing Nina Bernstein & Frank Bruni, *She Suffered in Plain Sight But Alarms Were Ignored*, N.Y. TIMES, Dec. 24, 1995, at 1, 22).

¹¹⁷ See Roberts, *supra* note 2, at 115 (citing Richard J. Gelles, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES* (1996)).

parents. His mother suffocated him.¹¹⁸ These and other similarly tragic stories are credited with influencing Congress's response to the reasonable efforts provision of AACWA.¹¹⁹

While members of Congress seemed to give the most attention to decisions that returned children to danger or death in their homes, they also faulted the system for leaving children in foster care for too long.¹²⁰ Prior to AACWA, agencies were charged with not doing enough to reunite parents and children, and thus the children were languishing in foster care.¹²¹ After AACWA, the result was the same, but now agencies were said to be trying too hard to reunite children with their families, and the blame was placed on the reasonable efforts requirement.

Senator DeWine, for example, complained in May 1997, that parents were being given a “second chance, a third chance, a fourth chance, a fifth chance, and on and on,

¹¹⁸ See Bufkin, *supra* note 95, at 375 (citing Richard J. Gelles, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* (1996)).

¹¹⁹ Bridget A. Blinn, *Focusing on Children: Providing Counsel to Children in Expedited Proceedings to Terminate Parental Rights*, 61 WASH. & LEE L. REV. 789, 818 (2004); see also *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 192-93 (1989) (The state had temporary custody of Joshua but returned him to his father; the caseworker observed “a number of suspicious injuries” in the next six or seven months; Joshua's father eventually beat the four-year-old so severely that he suffered permanent and severe brain injury.); Crossley, *supra* note 116, at 273-74 (Fifteen month old David, killed by his mother despite reports to child protective services and a prior voluntary termination of parental rights because case manager did not feel the state made reasonable efforts; six-year-old Elisa killed by her mother after years of substantial abuse because case manager failed to remove her despite not being subject to the reasonable efforts requirement; Joseph, who was to be removed from his mother's care but was returned home to her, and subsequently killed, when the county lost his records).

¹²⁰ See generally David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 144-150 (1992) (discussing the developmental harm caused to children by long-term foster placement); Michael S. Wald, *State Intervention on Behalf of “Neglected” Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 644-46 (1976) (discussing the harms of foster care).

¹²¹ See *supra* text accompanying note 83.

while they are trying to get their act together.”¹²² Meanwhile, “their poor little children are shuttled from foster home to foster home, spending their most formative years deprived of what all children should have – a safe, stable, loving, and permanent home.”¹²³

Congressman Earl Pomeroy emphasized the uncertainty foster children live with and suffer from:

In some instances, abused children live daily with the fear that they may be sent back by some people in some process they do not begin to understand into a home where the abuse occurred in the first place. They do not even go to bed at night with the sense of personal safety and security.¹²⁴

Finally, while ASFA’s legislative history does not reveal an explicit emphasis on cost effectiveness, common sense points to the wisdom of conserving scarce resources for reunification efforts that have a chance of working, and for using them to benefit children, not harm them. As Cristine Kim wrote in her oft-cited student note, “[r]easonable efforts has its optimal effect if made with respect to parents who are not ‘bad’ but have external problems or parents who may be ‘bad’ but exhibit a sincere desire and clear potential to change.”¹²⁵ The reallocation of resources made possible from being able to deny

¹²² 143 CONG. REC. S3947-02, S3947-48 (daily ed. May 5, 1997).

¹²³ DeWine told of twins who were placed in foster care when their mother, who had “serious substance abuse problems” abandoned them. While reunification efforts resulted in a decision to reunite the child and parent, this result took three and one-half years to come about. 143 CONG. REC. S3947-02, S3947-48 (daily ed. May 5, 1997). *See also* 143 CONG. REC. S12668-03, S12673, S12675 (daily ed. Nov. 13, 1997) (Senator Jim Jeffords: “Too often, children languish in foster care for years-years-before they find a safe, loving family.”; Senator Daniel P. Moynihan: “This bill . . . accelerates the process for determining the permanent placement for a child in foster care, so that children do not spend years bouncing among foster homes.”; Senator Larry Craig: The system is “trapping [children] in what was supposed to be ‘temporary’ foster care, instead of moving them into permanent homes.”).

¹²⁴ 143 CONG. REC. H10776, H10789 (daily ed. Nov. 13, 1997).

¹²⁵ Cristine H. Kim, *Putting Reason Back Into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. Ill. L. Rev. 287, 314 (1999). *See also* Burt, *supra* note 11, at 211, 314, 316.

reasonable efforts in certain circumstances was presumably recognized by Congress; it has not escaped the notice of state courts.

The Pennsylvania Superior Court commented, shortly after ASFA was enacted, on the serious and costly problems that foster care creates.¹²⁶ Quoting Richard Gelles, “an architect of” ASFA, the court discussed the “cost to the taxpayer” of using foster care for long-term placements “rather than as a pass through program, as originally intended.” “Keeping these kids stuck in temporary homes is not only devastating to the kids – it has been a fiscal disaster.”¹²⁷ The Maine Supreme Court emphasized the economic considerations two years later, in a 2000 prior involuntary termination of parental rights case:

The State also has a legitimate interest in making the best use of its limited resources. . . . [T]he Department's resources are limited and in many instances are insufficient even to meet the needs of parents who are able and willing to work on the impediments to the return of their children. . . . If difficult decisions regarding allocation of scarce resources must be made, the Legislature's determination that a prior involuntary termination is a factor to be considered is both reasonable and legitimate.”¹²⁸

And in 2003, the South Dakota Supreme Court commented that one of the effects of ASFA is that “the child protection system is not required to expend its limited resources attempting to reunify children with abusive parents if certain circumstances exist,” and that under these circumstances, states can move “more efficiently” toward termination of parental rights.¹²⁹

¹²⁶ See *In re Interest of Lilley*, 719 A.2d 327, 334 (Pa. Super. Ct. 1998) (noting “a serious and costly problem in human lives and public monies relating to the grid lock of foster care this country.”).

¹²⁷ *Id.* at 335.

¹²⁸ *In re Heather C.*, 751 A.2d 448, 456 (Me. 2000).

¹²⁹ *People ex rel. D.B.*, 670 N.W.2d 67, 70 (S.D. 2003). See also *In re L.N.*, 689 N.W.2d 893, 898 (S.D. 2004) (“ASFA gives courts the *discretion* to identify the most egregious

3. ASFA's Clarification and Retention of Reasonable Efforts

While Congress continued the reasonable efforts requirement in ASFA, it also responded to the criticisms that reasonable efforts were, under AACWA, too often “unreasonable,” and that children were too often being subjected to dangerous homes or lengthy foster care stays. It thus took care to include language emphasizing the primacy of the health and safety of the children,¹³⁰ and it also included several specific provisions designed to limit the reasonable efforts requirement.

Congress first required state plans to “contain[] assurances that . . . the safety of the children to be served shall be of paramount concern.”¹³¹ Congress then emphasized this hierarchy by liberally sprinkling “safe,” “safety,” and “safely” throughout the applicable provisions of the United States Code.¹³² Under AACWA, for example, reasonable efforts were required “to make it possible for the child to return to his home.” Under ASFA, reasonable efforts are required to make it possible for children to “safely return” to their homes.¹³³ AACWA also required states to make reasonable efforts to return children to their homes “in each case.”¹³⁴ A centerpiece of ASFA's clarification of reasonable efforts

cases at the early stages of child protection proceedings without providing fruitless reunification services.”); *In re I.H.*, 674 N.W.2d 809, 812 (S.D. 2004) (“ASFA provides an exception to the reasonable efforts requirement in cases where the court determines that a parent has subject a child to ‘aggravated circumstances.’”).

¹³⁰ *E.g.*, ASFA § 305(b), 42 U.S.C. § 629b(a)(9). *See Sanders, supra* note 96, at 227 (noting that “ASFA has not abandoned the family preservation model, merely subordinated it to child safety”); *Harvard Law Review Ass'n, supra* note 93, at 2116 (“under current policy a child's health and safety is the primary concern.”).

¹³¹ ASFA § 305(b), 42 U.S.C. § 629b(a)(9).

¹³² ASFA § 102, codified as amended in scattered sections of 42 U.S.C. 601 et seq.) (titled “INCLUDING SAFETY IN CASE PLAN AND CASE REVIEW SYSTEM REQUIREMENTS”) (emphasis in original).

¹³³ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(B)(ii).

¹³⁴ AACWA § 101(a).

is its provision allowing states to deny reunification efforts in three categories of circumstances, the second and third of which are circumstance-specific.

Subsection (ii) of section 671(15)(D) releases states from required reunification efforts in situations already identified as exempt from reasonable efforts one year earlier, in the Child Abuse and Prevention Act Amendments of 1996 (CAPTA).¹³⁵ Reasonable efforts are not required where the parent has committed certain criminal acts: murdered or committed voluntary manslaughter of another child of the parent; aided or abetted, attempted, conspired, or solicited to commit a murder or voluntary manslaughter of another child of the parent; or committed a felony assault that resulted in a serious bodily injury to the child or another child of the parent.¹³⁶ Subsection (iii) of section 671(15)(D) makes reasonable efforts discretionary where the parental rights of the parent to a sibling of the child have been terminated involuntarily.¹³⁷

The first category of exceptions, subsection (i) of section 671(15)(D), is the aggravated circumstances exception, making reasonable efforts discretionary where the parent has subjected the child to “aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse).”¹³⁸

Each of ASFA’s exceptions identifies past or current circumstances that operate not only to rebut the presumption of reasonable efforts being in the child’s best interests, but also to trigger, in effect, a presumption that serious harm or detriment will result to the

¹³⁵ Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-23 § 107(b)(2)(A)(xii), 110 Stat. 3063 (1996) (CAPTA).

¹³⁶ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(E)(ii).

¹³⁷ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(E)(iii).

¹³⁸ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(E)(i).

child before the court if reunification efforts are attempted.¹³⁹ While the harm presumed can be a return to a dangerous home, Representative Clay Shaw, when discussing an earlier version of ASFA, also recognized these exceptions as an important part of the response to lengthy foster stays and their threat to the safety of children: “[I]f families will not or cannot change within a reasonable period of time, we must, in the interest of the children, be willing to terminate parental rights and move expeditiously toward adoption.”¹⁴⁰ “We do this by allowing states to define what we call aggravated circumstances that allow them to dispense with services for the family and get on with the business of finding an adoptive home for the child.”¹⁴¹

Here too, in connection with the reasonable efforts exceptions, Congress took precautions to ensure the primacy of health and safety. It included its own statutory construction rule, applicable to the reasonable efforts requirement,¹⁴² providing that “nothing in this part shall be construed as precluding State courts from exercising their

¹³⁹ See Herring, *supra* note 2, at 337 (noting the state is excused from attempting to reunify the family and that the law presumes that the parent is unfit); see also Sallie K. Christie, Note, *Foster Care Reform in New York City: Justice for All*, 36 COL. J.L. SOC. PROBS. 1, 4-5 (2002). If a parent has committed a CAPTA criminal act, ASFA requires the state, with some exceptions, to file a termination of parental rights petition. The same requirement does not apply to the prior TPR or aggravated circumstances exceptions, however. 42 U.S.C. § 675(5)(E). See *infra* text accompanying notes 147-150.

¹⁴⁰ 143 CONG. REC. H 2012-06, H2015-16 (daily ed. Apr. 13, 1997).

¹⁴¹ *Id.* Representative Shaw’s remarks were about the Adoption Promotion Act of 1997 (APA) an earlier version of ASFA, which also required that a termination of parental rights petition be filed if a child younger than 10 had been in foster care for 18 of the most recent 24 months. *Id.* at H2024; Adoption Promotion Act of 1997, H.R. 867, 105th Cong. § 3(a)(3)(E).

¹⁴² Section 101(d) of ASFA states that the rule of construction amends Part E of title IV, 42 U.S.C. §§ 670-679 (and thus it applies to the reasonable efforts provision and the exceptions to the reasonable efforts provision). ASFA § 101(d), 42 U.S.C. § U.S.C. 678.

discretion to protect the health and safety of children in individual cases, including cases other than those [exempted from reasonable efforts].”¹⁴³

And finally – and significantly – Congress took additional steps to protect the emotional and psychological well-being of children who were spending too much of their childhoods in “temporary” foster care, by directing states to focus on finding, more quickly, permanent situations for these children. If reasonable reunification efforts are denied (or discontinued), ASFA also requires the states to expend reasonable efforts “to complete whatever steps are necessary to finalize the permanent placement [including adoption] of the child.”¹⁴⁴ Along with this, Congress shortened the timeline for dispositional or “permanency” hearings from 18 months to 12 months,¹⁴⁵ requiring states to decide more quickly whether a child will go back to his or her parents or be placed for adoption (thus necessitating a termination of parental rights).¹⁴⁶ In addition, Congress shortened the time for reasonable efforts by requiring a termination of parental rights petition to be filed if a child is in foster care for “15 of the most recent 22 months”¹⁴⁷; if the child is an abandoned infant; or if any of the subsection (ii) of section 671(15)(D) (CAPTA

¹⁴³ ASFA § 101(d), 42 U.S.C. § 678. Robert Gordon suggests that while this provision allows states to deny reasonable efforts in cases other than those explicitly excepted in ASFA, a parent could still demand a judicial hearing authorizing the denial of services. Gordon, *supra* note 4, at 680 n.250 (1999) (citing ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D), which provides that “reasonable efforts . . . shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that” one of the exceptions exists).

¹⁴⁴ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(C).

¹⁴⁵ ASFA § 302, 42 U.S.C. § 675(5)(c).

¹⁴⁶ A legal guardianship or another planned permanent living arrangement may also be the “permanency plan” for the child. ASFA § 107, 42 U.S.C. § 675(1)(E).

¹⁴⁷ ASFA § 103(a), 42 U.S.C. § 675(5)(E).

criminal acts) circumstances exist.¹⁴⁸ In each of these situations the state is required, with some exceptions,¹⁴⁹ to file a termination of parental rights petition and move towards adoption.¹⁵⁰ Finally, to complement this emphasis on permanency, Congress also heightened and provided support for adoptions, including adoption incentive payments, concurrent planning (placing children in their pre-adoptive homes while reasonable efforts are on-going), and specific requirements to identify and approve families for adoptions.¹⁵¹

The multiple provisions in ASFA targeting lengthy foster stays emphasize the concern Congress had about the threat of these stays to the health of children. To interpret aggravated circumstances, then, in line with the broader legislative provisions and aims of ASFA, requires recognizing not only the risk of harm that comes from children being returned to dangerous parents, but also the risk of delayed or denied permanence that comes from long and uncertain stays in foster care. It also requires recognizing one

¹⁴⁸ The CAPTA criminal acts exceptions include when the parent has murdered another child of the parent; committed voluntary manslaughter of another child of the parent; aided, abetted, attempted, conspired, or solicited to commit a murder of voluntary manslaughter of another child of the parent; or committed a felony assault that resulted in a serious bodily injury to the child or another child of the parent. ASFA § 107, 42 U.S.C. § 675(1)(E)(ii).

¹⁴⁹ The exceptions are when:

- (i) at the option of the State, the child is being cared for by a relative;
- (ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
- (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 671(a)(15)(B)(ii) of this title are required to be made with respect to the child

ASFA § 103(a), 42 U.S.C. § 675(E).

¹⁵⁰ ASFA § 103(a), 42 U.S.C. § 675(E) (requiring the state “concurrently . . . identify, recruit, process, and approve a qualified family for adoption.”).

¹⁵¹ Bean, *supra* note 16, at 328.

additional harm – that which is inflicted on a child when parental rights to that child are terminated.

The reasonable efforts requirement was meant to preserve families and to prevent terminations of parental rights. Central to any analysis of aggravated circumstances, then, is reading each of ASFA’s exceptions as it is presented – as a part of the “Clarification of the Reasonable Efforts Requirement.”¹⁵² Congress wanted to clarify, not repeal, the reasonable efforts provision. And while most of the commentary in the legislative history focuses on circumstances when reasonable efforts should not be made, a sprinkling of specific comments confirm the underlying agreement on the rationale behind reasonable efforts. Senator DeWine again: “Family reunification is very important. It is a laudable goal[;] we all want to try that,”¹⁵³ and Representative Dave Camp: “[ASFA] calls upon States to continue efforts to reunite the family”¹⁵⁴ More explicit is the House Report on ASFA, which addresses the “importance and essential fairness of the reasonable efforts criterion” and instructs that ASFA does not seek to effect “a wholesale reversal of reasonable efforts.”¹⁵⁵ “Rather than abandoning the Federal policy of helping troubled families, what is needed is a measured response to allow States to adjust their statutes and practices so that in some circumstances States will be able to move more efficiently toward terminating parental rights and placing children for adoption.”¹⁵⁶ ASFA’s emphasis on

¹⁵² ASFA § 101.

¹⁵³ *Barriers to Adoption*, *supra* note 98, at 41.

¹⁵⁴ 143 CONG. REC. H 2012-06, H2017 (daily ed. Apr. 30, 1997) (additionally noting that “in some cases reunification is not in the child’s best interest”).

¹⁵⁵ H.R. Rep. 105-77, at 8 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2740.

¹⁵⁶ *Id.*

permanency, in fact, fully encompasses the rationale for reasonable efforts¹⁵⁷ – to “minimize[] the likelihood that [children] will suffer harmful separation from their parents.”¹⁵⁸

States thus retain the discretion to provide reunification services when appropriate,¹⁵⁹ even when an exception applies. Representative William Goodling highlighted this discretionary aspect when discussing the CAPTA criminal acts exceptions, noting the amendments are “intended to give the States flexibility in this area States may still seek to reunify the family, but will no longer be required to do so by Federal law.”¹⁶⁰ State courts have also recognized this distinction by consistently speaking of the “discretion” to deny reasonable efforts when considering the bypass provisions. The New Mexico Court of Appeals discussed the “discretionary nature of the statute” in a 2002 termination of parental rights case, noting that New Mexico’s statute “does not mandate that the state cease reasonable efforts once there has been a prior termination of parental rights. . . . [Our ASFA statute] provides the trial court with discretion to relieve the state of the burden of providing services.”¹⁶¹ The Maine Supreme Court also emphasized the

¹⁵⁷ See generally Sanders, *supra* note 96, at 227 (noting that ASFA does not abandon the family preservation model, but “merely subordinate[s] it to child safety and permanency timeline goals”).

¹⁵⁸ See Gordon, *supra* note 4, at 653.

¹⁵⁹ *In re Heather C.*, 751 A.2d at 455. See also N.J. Div. of Youth & Fam. Servs. v. A.R.G., 824 A.2d 213, 234 (N.J. Super. Ct. App. Div. 2003) [hereinafter *A.R.G. Super. Ct.*], *aff’d in part, modified in part, and remanded*, 845 A.2d 106 (N.J. Sup. Ct. 2004) [hereinafter *A.R.G. Sup. Ct.*]; *In re L.N.*, 689 N.W.2d 893, 897-98 (S.D. 2004)

¹⁶⁰ 142 CONG. REC. H11140-01, H11152 (daily ed. Sept. 25, 1996).

¹⁶¹ *State ex rel. Children, Youth & Families Dept. v. Amy B.*, 61 P.3d 845, 849 (N.M. App. 2002); see also *In re A.H.*, 763 A.2d 873, 878 (Pa. Super. Ct. 2000) (“[ASFA] . . . provides the court with discretion to determine whether or not reasonable efforts to prevent or eliminate the need for removing the child from the home or to preserve and reunify the family shall be made or continue to be made when the court finds aggravated circumstances exist.”) (internal quotations omitted); *In re R.P.*, 2008 WL 3875415 at *13

distinction, noting that Maine’s ASFA statute “is written to *allow*, but does not mandate, that the Department be relieved of its responsibilities.”¹⁶² Still, a discussion of whether an exception applies usually takes place only when the state seeks to deny reunification efforts. In this sense, they are one and the same.

B. The Immediate Legislative Context of the Aggravated Circumstances Exception

Words are known by the company they keep.¹⁶³ The aggravated circumstances exception¹⁶⁴ keeps company with two others, the CAPTA criminal acts exception (murder, manslaughter, etc.)¹⁶⁵ and the prior involuntary termination of parental rights (TPR) exception.¹⁶⁶ How these exceptions operate is instructive in several ways. They first suggest that Congress intended states to be able to deny reasonable efforts only with evidence of an act or circumstance that was meant to inflict or did inflict a very serious harm or detriment on a child.

The CAPTA circumstances are particularly serious, in part because of their immediacy. The extremes in this exception include murder, defined by the United States Code as “the unlawful killing of a human being with malice aforethought,”¹⁶⁷ and voluntary manslaughter, “the unlawful killing of a human being without malice[,] [u]pon a

(Pa. Super. Ct. May 12, 2008) (“When the court finds aggravated circumstances exist, it is well within its discretion to order the cessation of reunification services.”).

¹⁶² *In re Heather C.*, 751 A.2d at 455 (emphasis in original).

¹⁶³ Jellum and Hrick, *supra* note 51, at 151.

¹⁶⁴ ASFA § 101(a), 42 U.S.C. § 671(15)(D)(i).

¹⁶⁵ ASFA § 101(a), 42 U.S.C. § 671(15)(D)(ii).

¹⁶⁶ ASFA § 101(a), 42 U.S.C. § 671(15)(D)(iii).

¹⁶⁷ 18 U.S.C. § 1111(a) (2000). The CAPTA criminal acts exceptions in ASFA note specifically the United States Code definitions for murder and voluntary manslaughter, e.g., reasonable efforts are not required if the parent has “committed murder (which would have been an offense under section 1111(a) of Title 18)” ASFA § 101(a), 42 U.S.C. § 671(15)(D)(i), (ii).

sudden quarrel or heat of passion.”¹⁶⁸ The harm resulting from a felony assault, however, is similarly serious. Generally, a crime is classified as a felony when the punishment is imprisonment for more than one year,¹⁶⁹ and the felony circumstance also requires, by definition, that the assault result in “serious bodily injury.”¹⁷⁰ The final CAPTA circumstance is simply an extension of the murder and voluntary manslaughter provisions, i.e., when a parent has aided, abetted, attempted, conspired, or solicited to commit the murder or voluntary manslaughter.¹⁷¹

The involuntary TPR exception similarly captures only very serious harms or circumstances. A termination of parental rights can be said to inflict two harms on a child. The first comes from the circumstance that justifies the termination. The termination of

¹⁶⁸ 18 U.S.C. § 1112(a) (2000).

¹⁶⁹ “A crime is a felony if . . . persons convicted thereof may be sentenced [to death or] to imprisonment for a term that . . . is in excess of one year.” MODEL PENAL CODE § 1.04(2) (brackets in original).

¹⁷⁰ The phrase “serious bodily injury” was defined in CAPTA to mean “bodily injury which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” CAPTA § 107(b)(4)(B), 42 U.S.C. § 5106a(b)(4)(B). Under the Model Penal Code, ASFA’s felony assault provision would probably fit within the definition of aggravated assault, which includes: “causes [a serious bodily injury to another] purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.” MODEL PENAL CODE § 211.1(2)(a). A section 211.1(2)(a) aggravated assault under the Model Penal Code is a second degree felony. *Id.* See also *Brown v. Spotsylvania Dept. of Soc. Services*, 597 S.E.2d 214, 218 (Va. Ct. App. 2004) (construing “felony assault resulting in serious bodily injury” as being concerned with the effect the crime had on the child); *In re Janet J.*, 666 N.W.2d 741, 751 (Neb. Ct. App. 2003) (holding that a spiral fracture of the leg of the child involved “a substantial risk of disfigurement or protracted loss or impairment of the function of that leg and was therefore a serious bodily injury”), *disapproved of on other grounds by* *In re Jac’Quez*, 669 N.W.2d 429, 435 (Neb. 2003).

¹⁷¹ ASFA § 101(a), 42 U.S.C. § 671(15)(D)(ii). Congressional Record references to the 1996 CAPTA amendments further indicate that Congress was focused on very serious circumstances. The listed exceptions were adopted, according to Representative William Goodling, to prevent “overzealous attempts of ‘family’ preservation” that place “children back into homes where parents have been convicted of *egregious* acts.” 142 CONG. REC. H11140-01, H11148 (daily ed. Sept. 25, 1996).

parental rights has been characterized as a civil “death penalty” by many state courts,¹⁷² and thus requires a substantial justification.¹⁷³ Legislative examples of grounds for termination include (a) abandonment; (b) abuse or neglect; (c) unfitness of the parent; (d) parent’s failure to provide child support; (e) mental or physical disability of the parent; (f) incarceration of the parent; (g) risk of serious physical, mental or emotional injury to the child; and (h) dependency.¹⁷⁴ In most states a termination must be supported by clear and convincing evidence¹⁷⁵ showing that the parent is unfit¹⁷⁶ and additionally, that the termination is in the best interest of the child.¹⁷⁷ In other words, the harm that justified the termination is, by definition, very serious.

¹⁷² *In re Interest of Lilley*, 719 A.2d at 329; *In the Interest of P.D.*, 144 S.W.3d 907, 911 (Mo. App. E.D. 2004); *In re A.C.*, 827 N.E.2d 824, 831 (Ohio App 2005); *In the Interest of S.A.C.*, 938 So. 2d 1107, 1109 (La. App. 2006); *In re N.R.C.*, 94 S.W.3d 799, 811 (Tex. App. Houston 14th Dist. 2002); *In re Parental Rights as to K.D.L.* 58 P.3d 181, 186 (Nev. 2002).

¹⁷³ While the grounds for termination are many and varied, *see infra* text accompanying note 174, it is generally recognized that an involuntary termination of parental rights interferes with the right of a parent to the care, custody and management of his or her child. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing the “fundamental liberty interest of natural parents in the care, custody, and management of their child”).

¹⁷⁴ *See generally* John DeWitt Gregory, et al, UNDERSTANDING FAMILY LAW 183-191 (3d ed., Lexis Nexis 2005).

¹⁷⁵ *Santosky*, 455 U.S. at 747-48; *see In re Interest of Lilley*, 719 A.2d at 330-31 (noting the trier of fact must “come to a clear conviction, without hesitancy, of the truth of the precise facts in issue”).

¹⁷⁶ *See, e.g.*, Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 678 (2002) (stating the Court’s analysis in *Santosky*, 455 U.S. at 765-66, “endorsed a high, unfitness-based standard”); *see also In re Interest of Lilley*, 719 A.2d at 329 (Pennsylvania requires clear and convincing, and petitioner must prove “(1) repeated and continued incapacity, abuse, neglect or refusal; (2) that such incapacity, abuse, neglect or refusal caused the child to be without essential parental care, control or subsistence; and (3) that the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied.”).

¹⁷⁷ *See* James G. Dwyer, *A Taxonomy of Children's Existing Rights In State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 955-56 (2003); S. Adam Ferguson, Note, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 Geo. IMMIGR. L.J. 85, 93 (2007).

In addition to the harm that caused the termination, however, a termination of parental rights also inflicts a severance of the parent-child relationship.¹⁷⁸ The “immensely influential” writings by Joseph Goldstein, Anna Freud, Albert Solnit, and Sonja Goldstein on the best interests of the child have persuaded most professionals in the field that “disrupting the parent-child relationship seriously hurts children of all ages.”¹⁷⁹ One author asserts, with some justification, that AACWA, in fact, “was based on the premise that removal of a child from his or her home is so harmful to his or her psyche that it is never in a child’s best interests to be removed.”¹⁸⁰

The CAPTA and TPR exceptions thus indicate a very serious harm should be required before reasonable efforts can be bypassed. They also suggest that the harm triggering the exception for the child before the court can be derivative. But for the CAPTA felony assault circumstance, which can involve either the child before the court or another child,¹⁸¹ the other circumstances in the CAPTA and TPR exceptions involve only “another child” of the parent.¹⁸² The risk of harm to the child currently before the court, should the state make efforts to reunite parent and child, is thus most often predicted by a

¹⁷⁸ Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 414-15 (1996).

¹⁷⁹ Gordon, *supra* note 4, at 653; *see generally id.* at 653-54 (noting that the work had been “harshly criticized for its lack of empirical support, among other things,” but that the “work is nonetheless compelling in view of what is now known.”); Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL’Y & L. 176, 221-22 (2004); Blinn, *supra* note 119, at 812-13.

¹⁸⁰ Pagano, *supra* note 92, at 243. The argument about the tipping point, however, remains: When does the harm the parent is subjecting the child to constitute a greater harm than that which the severance of the parent-child relationship will inflict? *See* Blinn, *supra* note 119, at 813.

¹⁸¹ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D)(ii).

¹⁸² ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D)(ii), (iii).

very serious harm inflicted upon another child. This type of presumption is not new to abuse and neglect law.

In 1996, a year before ASFA, the Missouri Court of Appeals nicely captured the concern that a parent who has caused severe harm to one child will cause severe harm to another child.¹⁸³ The mother had argued that the termination of her parental rights to two children, based on her murder of a stepsibling, was not supported by clear, cogent, and convincing evidence, as required by law.¹⁸⁴ “The termination of parental rights of an abusing parent under this subsection,” said the court, “is premised on the belief that requiring the child to suffer the fate of his or her sibling (or step-sibling) prior to termination of the rights of the abusing parent would defeat the purpose of the law.”¹⁸⁵ A New York Family court articulated the implicit qualifiers that often go with this belief and assumption: the abuse must be serious, not too remote in time, and demonstrative of a fundamental defect in the parent’s understanding of his or her duties.¹⁸⁶ If these circumstances exist, a court need not “‘await broken bone or shattered psyche before extending its protective cloak around [another] child’.”¹⁸⁷

Further, courts in another New York case, in *In re Marino S.*,¹⁸⁸ emphasized not only the validity of derivative abuse, but also ASFA’s recognition of derivative abuse and harms. *Marino* involved only one child who was directly abused, but the trial court relied

¹⁸³ *In re K.O.*, 933 S.W.2d 930, 934 (Mo. Ct. App. 1996).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 934 (citing *In Interest of P.M.*, 801 S.W.2d 773, 776 (Mo. App. W.D. 1991).

¹⁸⁶ *DSS ex rel. Moria I. v. Manuel S.*, 563 N.Y.S.2d 592, 596 (N.Y. Fam. Ct. 1990).

¹⁸⁷ *Id.* at 596-97 (quoting *Matter of Anthony*, 366 N.Y.S.2d 333, 336 (N.Y. Fam. Ct. 1975)).

¹⁸⁸ *In re Marino S.*, 795 N.E.2d 21 (N.Y. 2003) [hereinafter *Marino Ct. App.*], *aff’g*, 741 N.Y.S.2d 207 (N.Y.S. Ct. 2002), *aff’g* 693 N.Y.S.2d at 828 (N.Y. Fam. Ct. 1999).

on this abuse to deny reasonable efforts for the child’s siblings also.¹⁸⁹ The trial court noted the “premise” of ASFA encompasses the reasoning of derivative abuse by assuming that “in certain types of cases, . . . the dangers of reunification often outweigh any potential benefit.”¹⁹⁰ On appeal, the New York Supreme Court affirmed.¹⁹¹ It too commented on the derivative nature of ASFA’s discretionary bypass provisions, noting that one of ASFA’s “goals was to prevent the return of a child to unrehabilitated abusive or neglectful parents, and, to that end, the Act created categories of cases in which ‘reasonable efforts’ to provide for a return of the child to the parent(s) were not required.”¹⁹² Finally, the New York Court of Appeals, also affirming, relied on both the validity of derivative findings and ASFA’s recognition of derivative harms.¹⁹³ The Court noted that a “derivative finding[] of severe abuse may be ‘predicated upon the common understanding that a parent whose judgment and impulse control are so defective as to harm one child in his or her care is likely to harm others as well.’”¹⁹⁴ Further, the Court of Appeals emphasized that ASFA was meant to expedite permanency planning for abused children by allowing the agency to be excused from expending “considerable effort in preparing an obviously unfit parent for permanent placement.”¹⁹⁵

If the aggravated circumstances exception is interpreted consistently with the CAPTA and TPR exceptions, then, it may be triggered only with evidence of a very serious

¹⁸⁹ *Marino Fam. Ct.*, 693 N.Y.S.2d at 831.

¹⁹⁰ *Id.*

¹⁹¹ *In re Marino*, 741 N.Y.S.2d 207 (N.Y.S. Ct. 2002) [hereinafter *Marino S. Ct.*].

¹⁹² *Marino S. Ct.*, 741 N.Y.S.2d at 211.

¹⁹³ *Marino Ct. App.*, 795 N.E.2d at 28.

¹⁹⁴ *Marino Ct. App.*, 795 N.E.2d at 28 (quoting *Marino Fam. Ct.*, 693 N.Y.S.2d at 831).

But see Robert May, Note, *Derivative Neglect in New York State: Vague Standards and Over-Enforcement*, 40 COLUM. J.L. & SOC. PROBS. 605, 613-14 (2007) (criticizing the similar “fundamental defect” or “fundamentally flawed” standard).

¹⁹⁵ *Marino Ct. App.*, 795 N.E.2d at 26.

harm. That harm may have been directed at either the child before the court or another child of the parent. These triggering harms are the central and defining feature of the CAPTA and TPR exceptions, but their purpose is to protect the child before the court from the harms they predict. Thus understanding the harms the CAPTA and TPR exceptions predict is also helpful.

The CAPTA criminal acts exception most frequently predicts that one of two very serious harms will occur if reunification efforts are attempted. The child will either be returned to a dangerous home or will linger in foster care. In most CAPTA circumstances, the parent has shown the capacity to inflict a very serious harm, often instantaneously. A parent who has demonstrated the capacity to murder his or her own child, for example, predicts not only a very serious risk to the subject-child if the child is returned to parent, but a risk that has little warning or opportunity for the state to remove the child if the parent acts again. In addition, given the nature of the risk associated with most CAPTA acts, it is more difficult for parents to assure the state that they have successfully remediated their problem. The situation thus also risks leaving the child in foster care for too long.

An aggravated circumstance case reflecting both of these dangers was present in a 2005 “shaken baby” case in South Dakota.¹⁹⁶ The baby, an eight-month-old boy, and his sister were removed from the mother after the boy suffered major life-threatening injuries.¹⁹⁷ After the children were placed in foster care, the mother contacted the child protection agency on her own, asking what she needed to do to regain custody of her children. The agency provided a plan requiring that the mother address parenting, anger

¹⁹⁶ *In re E.L.*, 707 N.W.2d 841, 843 (S.D. 2005).

¹⁹⁷ *Id.*

management, and visitation.¹⁹⁸ The trial court ultimately found the agency failed to make reasonable efforts to reunite the mother with her children, but that the circumstances were “aggravated,” thus releasing the state from the reasonable efforts requirement.¹⁹⁹ The South Dakota Supreme Court affirmed the trial court’s holding and termination of the parents’ parental rights.²⁰⁰

The risk the Supreme Court recognized most was that of returning the child to the mother. The Court noted that the caseworker believed the children would be at risk if they were returned, and relied on the caseworker’s testimony that “even though” the mother’s assault of the child was a “split second poor decision,” that it had happened provided a reason “to believe it could happen again.”²⁰¹ The risk of extended foster care in such a situation was also demonstrated, however, as the Court conceded the mother had completed “all that was asked of her” in the reunification plan and that she had even “sought out more in an attempt to regain custody of her children.”²⁰² However, “just because Mother completed the objectives of her [reunification] plan does not establish that Mother would no longer be a risk to the safety of the children.”²⁰³

This comment by the Court demonstrates the difficulties parents face in showing they are no longer a risk to their children, even when they have complied with the reunification plan. Child welfare expert Richard Gelles,²⁰⁴ in a 1996 Senate hearing on

¹⁹⁸ *Id.* at 844.

¹⁹⁹ *Id.* at 844-45.

²⁰⁰ *Id.* at 843.

²⁰¹ *Id.* at 847.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Gelles currently holds The Joanne and Raymond Welsh Chair of Child Welfare and Family Violence in the School of Social Policy & Practice, is the Director for the Center for Research on Youth & Social Policy, and is Co-Director of the Field Center for

abused and neglected children,²⁰⁵ identified this problem as one of distinguishing change from compliance. Compliance is when the parents have done what they have been asked to do, e.g., go to anger management class, keep the house clean, go to drug abuse counseling. But social workers, lawyers, and judges must make judgments about child placements based on “risk and change, not simply the passage of time and compliance.”²⁰⁶

These judgments are particularly difficult when a parent has created circumstances that predict the possibility of an immediate and very serious harm to a child, such as those in the South Dakota shaken baby case.²⁰⁷ As Gelles noted, child protection workers must make “pretty hard decision[s] based on some pretty soft data.”²⁰⁸ Given the seriousness and the irreparable nature of the harm that may await a child, the difficulty the state faces in assessing whether the parent has truly changed, and the state’s relative inability to prevent the harm if the child is returned, the risk in a CAPTA-like circumstances case is great. If reunification efforts are made, the child might be returned to a dangerous home, but equally or even more likely is that the child will be kept in foster care for too long, out of a continuing fear of the danger of reunification.

CAPTA and CAPTA-like acts can also be the basis for an involuntary termination of parental rights, and thus ASFA’s TPR exception predicts and protects against these same harms. But terminations additionally occur because of ongoing and chronic

Children's Policy Practice & Research. Univ. Pa. School of Soc. Policy & Prac., <http://www.sp2.upenn.edu/people/faculty/gelles/> (accessed October 23, 2008).

²⁰⁵ *Abused and Neglected Children Hearing*, *supra* note 78, at 9 (statement of Richard J. Gelles).

²⁰⁶ *Id.* at 15.

²⁰⁷ *In re E.L.*, 707 N.W.2d at 843.

²⁰⁸ *Abused and Neglected Children Hearing*, *supra* note 78, at 15 (1996) (statement of Richard J. Gelles) (“And we have not yet provided the child welfare system with an appropriate measure of risk and change.”).

circumstances.²⁰⁹ Consequently, it is important to ask what harms these triggering circumstances are designed to protect against. The immediate effect of the harm inflicted on a child returned to a chronic situation, while sufficient to require state intervention, is often not as serious as that in a CAPTA circumstance. Further, the parents may have more of an opportunity to show change and not merely compliance. Parents who have neglected a child as a result of a drug addiction, for example, may be able to submit test results to show they are no longer doing drugs. While not proving lasting change, the evidence does establish a drug-free status quo and may suggest a diminished risk to the child should reunification occur. Finally, if the parent relapses, the state may be able to intervene before the harm to the child becomes too serious and irreparable. These types of harms, by themselves, are not necessarily serious enough to trigger an exception to the requirement of reasonable reunification services.

If, however, chronic abuse or neglect circumstances have been an issue, and such that they resulted in a termination of parental rights – which is the measurement of harm recognized by ASFA’s TPR exception – the parent apparently failed to remediate, even when faced with the loss of parental rights. Thus, even if the current circumstances are such that the child before the court can be removed before a serious or irreparable harm accrues, the parent’s involuntary termination of parental rights with another child predicts that such a removal *will* be necessary, that the parent *will* lapse in his or her remediation, and thus, the child *will* be subject to a lengthy and uncertain foster stay.

²⁰⁹ *E.g.*, In re Adoption of Melvin, 885 N.E.2d 874, 880 (Mass. App. Ct. 2008 (“[T]he mother's marginal improvement in parenting skills despite her long-time involvement with the department showed that her unfitness was highly likely to continue into the indefinite future.”)).

The very serious harm that can come from returning a child to home where parents have committed a CAPTA-like act and have not yet remediated their problems is apparent. The harm that comes from placing a child in a foster home is just as serious, however, as it results in an extended delay of permanence for the child.²¹⁰ In many of the chronic circumstances, the child may stay in foster care for too long because the parents have failed, yet again, to change. As stated by the California Court of Appeals, “delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. ‘Childhood does not wait for the parent become adequate.’ ”²¹¹ In the CAPTA-like situation, the child may stay in foster care because the state is waiting to be reassured the parent will not strike again – a wait that may never end. ASFA recognizes the lack of permanency that comes with foster care limbo, no

²¹⁰ See Gordon, *supra* note 4, at 655-56. Professor Catherine Ross recognized this harm when comparing circumstances she perceived to be “aggravated” to circumstances where a child was in foster care for fifteen of the last twenty-two months. Her comparison assumes that aggravated circumstances are easy to identify and generally assumes aggravated circumstances will be more immediately life-threatening and thus not involve foster care. But her comment highlights the different types of harms that can be inflicted on a child:

Generally, the aggravated circumstances cases are not complex in terms of either law or morality. The facts of those cases are so heinous that line-drawing should not prove difficult. In cases involving “aggravated circumstances” the parent has already put the child’s life at risk. In contrast, the cases in the second group [foster care for 15 of the last 22 months] are not so straightforward. With the passage of time, termination becomes more and more likely, and the needs all children have for stability and permanence are pitted directly against the claims of their parents.

Ross, *supra* note 179, at 197.

²¹¹ *In re Casey D.*, 82 Cal. Rptr. 2d 426, 432 (Cal. Ct. App. 1999) (quoting *In re Baby Boy L.*, Cal. Rptr. 2d 654, 670 (Cal. Ct. App. 1994) (internal cites and editing marks omitted).

matter what the reason, almost always endangers a child's health and safety in a serious and irreparable way.²¹²

Ultimately, then, the CAPTA and TPR exceptions protect the child before the court from two harms – the same two Congress consistently recognized when it enacted ASFA: children being returned to dangerous homes and children being left in foster care for too long. If the aggravated circumstances exception is interpreted as consistent with the company it keeps, the exception should apply only (1) when a very serious harm has occurred to either the child before the court or another child of the parent and (2) when those circumstances suggest the risk of either a return to a dangerous home or a too-long foster stay.²¹³

Finally, the presence of the involuntary TPR exception tends to emphasize that the details of the triggering circumstances must be relevant. One criticism of ASFA's TPR exception is that it applies without regard to the circumstances or timing of the termination.²¹⁴ One child advocate expressed this concern when ASFA was enacted: “A parent whose rights to another child were terminated when the parent was a teenager, for example, would be deprived of services even though, when the parent was older and more

²¹² See Gordon, *supra* note 4, at 653-55.

²¹³ See generally *id.* (discussing the rationale of ASFA).

²¹⁴ See Pagano, *supra* note 92, at 245 (citing Bill Grimm, *ASFA Brings Big Changes*, YOUTH L. NEWS, November/December 1997, at 1-2) (arguing that an involuntary termination of parental rights a parent experienced as a teenager could be used to deprive the parent of reasonable efforts in a current abuse or neglect case when efforts might “be appropriate” given the parent's current age and maturity); see also Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1190 n.4 (1999) (noting that the timing and circumstances of a prior termination are irrelevant for determining whether the discretionary bypass provision applies).

mature, reunification efforts might be appropriate.”²¹⁵ While the fear behind the criticism is understandable, the exception does not require states to deny reunification efforts; it only allows the state to do so. If the circumstances of the termination of parental rights and the child before the court indicate no undue risk of harm to the child, reunification efforts should be provided.

The Iowa Court of Appeals, faced with a prior involuntary termination of parental rights situation, recognized that the circumstances of the termination were important to its prognostic value and thus to the court’s decision concerning reunification efforts.²¹⁶ The court of appeals affirmed the trial court’s denial of reasonable efforts, but only after noting the relevant circumstances. The time between the prior termination and the birth of the child currently before the court was three weeks; the mother had been provided with a “‘myriad of services’ prior to the termination of her parental rights . . . but was unable to respond to them”;²¹⁷ and additional services to the mother “‘offered such a short period of time after a previous termination, would not correct the situation.”²¹⁸ In effect, the court confirmed that both the present circumstances and those of the prior termination predicted an undue risk to the child before the court if reunification efforts were provided.

The Maine Supreme Court similarly recognized the details of the neglect circumstances it deemed aggravated were important to the prognostic value of the circumstances: “As horrifying as the conditions in that apartment were, they must be seen

²¹⁵ Bill Grimm, *ASFA Brings Big Changes*, YOUTH L. NEWS, November/December 1997, at 1-2. See also *Smith*, 896 A.2d at 189 (noting a parent may have made “major positive changes” since the prior termination of parental rights).

²¹⁶ See *In re E.C.-0.*, No. 99-2016, 2000 WL 1028099, at *3 (Iowa Ct. App. July 26, 2000).

²¹⁷ *Id.*

²¹⁸ *Id.* (The mother had “an IQ of 84, and suffer[ed] from schizophrenia, schizoid personality disorder, avoidant personality disorder, narcissistic personality disorder, borderline intellectual functioning and an impairment of adaptive functioning.” *Id.* at *1.).

in the context. If [these] were first time parents with no resources, and no training, the apartment would have been no less appalling but, perhaps, not the basis for a cease reunification order.”²¹⁹

The relevance of circumstances to the prognostic value of a termination of parental rights is also confirmed by ASFA’s treatment of the CAPTA and TPR circumstances in another of its provisions. Section 103(a)(3)(E) of ASFA²²⁰ seeks to speed adoptions and thus permanency for children by requiring that states initiate terminations of parental rights in certain situations. Petitions are generally required,²²¹ along with concurrent efforts to place the child for adoption, when the child has been in foster care for 15 of the most recent 22 months, when a court determines that the child is an abandoned infant, or when the parent has committed any of the CAPTA acts.²²² Petitions are not required, however, as a result of the parent having an involuntary termination of parental rights²²³ with another

²¹⁹ *In re Ashley*, 762 A.2d 941, 948 (Me. 2000) (editing marks in original).

²²⁰ 42 U.S.C. § 675(E).

²²¹ There are three exceptions. A petition is not required to be filed when:

- (i) at the option of the State, the child is being cared for by a relative;
- (ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
- (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child’s home, if reasonable efforts of the type described in section 671(a)(15)(B)(ii) of this title are required to be made with respect to the child

ASFA § 103(a), 42 U.S.C. § 675(E).

²²² ASFA § 103(a), 42 U.S.C. § 675(E).

²²³ Martin Guggenheim, Book Review, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1731 n.76 (2000) (discussing ASFA).

child or because the parent has subjected the child before the court to aggravated circumstances.²²⁴

That ASFA does not require a petition for the child before the court based on the parent already having an involuntary TPR with another child recognizes how important the circumstances of any prior terminations can be. It also recognizes that the typical CAPTA circumstances, which do require a mandatory termination petition, simply provide less room for a discretionary decision to return the child to the home. With a CAPTA act, the feared harm is very serious and frequently instantaneous with its initial infliction; “change” versus compliance is hard to confirm; and the state’s ability to prevent the harm if the child is returned is slight. A termination of parental rights is a likely outcome for the child before the court.²²⁵ The prognostic value of a prior TPR, however, without considering past and present details, is not as reliable. Further, because the circumstances will matter, a decision to provide reunification efforts for the child before the court is more likely.

The effect of including prior terminations as a basis for an exception thus emphasizes that states may,²²⁶ and when the circumstances indicate that it is sufficiently safe to do so, should provide reasonable reunification efforts to the family.²²⁷

²²⁴ See ASFA § 103(a), 42 U.S.C. § 675(E).

²²⁵ Even in a CAPTA situation, however, a termination of parental rights petition does not have to be filed if the child protection agency documents a compelling reason demonstrating that it would not be in the best interest of the child ASFA § 103(a), 42 U.S.C. § 675(E)(ii).

²²⁶ See *supra*.text accompanying notes 159-162.

²²⁷ See *In re LN*, 689 N.W.2d 893, 898 (S.D. 2004) (concluding that “a court must necessarily consider whether a less restrictive alternative is appropriate in making the bypass decision. After all, [the South Dakota statute] does not preclude reunification efforts when aggravating circumstances are present. Rather, the statute simply provides that if aggravating circumstances are present, reunification efforts are not *required*”) (emphasis in original)).

Congress’s decision to omit aggravated circumstances from those situations for which a termination of parental rights petition must be filed might easily be because Congress left the definition of the phrase to the states. It might also suggest, however, that Congress thought the aggravated circumstances exception, like the involuntary TPR exception, would encompass a greater number of situations where reunification efforts would not present an unacceptable risk to the subject-child and should thus be provided. Regardless, scrutiny of ASFA’s provisions emphasizes it is the predicted fate of the child before the court – not the past or current circumstances in isolation – that matter. The exceptions allow, not require, states to deny reasonable efforts.

III. The Language of the Aggravated Circumstances Exception

The aggravated circumstances exception provides that reasonable efforts are not required when “the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse and sexual abuse).”²²⁸ The exception, like the CAPTA and TPR provisions, relies on past circumstances to predict future circumstances, specifically harm to the child before the court should reunification efforts be made. The CAPTA and TPR provisions, however, rely explicitly on distinct end-results for their circumstances, e.g., murder, and, except for the felony assault provision, these circumstances must directly involve another child of the parent. By contrast, the aggravated circumstance exception relies on a nebulous and abstract situation, i.e., circumstances that are aggravated. Additionally, while it is clear that those circumstances must involve the child before the court, how direct that

²²⁸ ASFA §101(a), 42 U.S.C. § 671(A)(15)(D)(i).

involvement must be is also unclear, i.e., the child must be “subjected to” the aggravated circumstances.

The few state court opinions that include a pointed effort to sort out the language of the aggravated circumstances exception have generally focused on “subjected the child to” and “aggravated circumstances.” The examples listed in the statute, “abandonment, torture, chronic abuse, and sexual abuse,”²²⁹ have received less attention, presumably because they are merely examples and additionally because most court opinions deal with specific state provisions. Still, since they are tangible examples of an otherwise abstract exception to reasonable efforts, a quick review is helpful.

A. Abandonment, Torture, Chronic Abuse, and Sexual Abuse

The characteristics of the examples provided by Congress confirm that “aggravated circumstances” must begin with, as do the other exceptions, circumstances that are very serious. They also confirm that Congress meant the aggravated circumstances exception to prevent the same types of harms as the other exceptions – very serious harms that (1) are immediate and thus irreparable or (2) come from foster care stays that are too long.

Torture. The plain meaning of torture, “[i]n infliction of severe physical pain as a means of punishment or coercion,”²³⁰ most suggests a type of child abuse that can inflict immediate harm. It also suggests a very serious and thus irreparable harm. Louisiana defines torture in its child abuse statutes to mean “torment, maiming, mutilation, or ritualistic or malicious acts causing extreme and unjustifiable physical or mental pain or

²²⁹ *Id.*

²³⁰ THE AMERICAN HERITAGE COLLEGE DICTIONARY 1429 (3d ed., Houghton Mifflin Co. 1993) [hereinafter HERITAGE DICTIONARY].

suffering, disfigurement, or injury.”²³¹ Maryland’s definition is “to cause intense pain to body or mind for purposes of punishment or extraction of information or for sadistic purposes.”²³² Sending a child back to a parent who has tortured a child, even after remedial efforts, would likely present “an unacceptably high risk to the health, safety and welfare of the child.”²³³ A “split second” single incident²³⁴ could cause death or other irreparable injury. Further, keeping the child in foster care until the state is adequately assured that the parents have changed, and not merely complied, would likely deprive the child of the permanency that is critical to protecting the child’s health and safety.

Sexual Abuse. Sexual abuse is similarly the type of abuse that can inflict an immediate and very serious, and thus irreparable harm. Kentucky’s abuse and neglect statute defines sexual abuse as including, but not limited to, “any contacts or interactions in which the parent . . . uses or allows, permits, or encourages the use of the child for the purposes of the sexual stimulation of the perpetrator or another person.”²³⁵ In addition, because of the usually secretive and private nature of sexual abuse, and the perception that traditional treatment is ineffective in changing the behavior of the abuser,²³⁶ reunification of a child with a parent who has sexually abused a child is also perceived as presenting a risk of reoccurrence without a visible warning that would allow a quick removal of the child. Finally, the foster stay likely required for assuring that the parent has changed, and

²³¹ LA. STAT. ANN. § 1003(14) (2004).

²³² MD. CTS. & JUD. PRO. CODE. ANN. § 3-812(a)(3) (2006).

²³³ See also *A.R.G. Super. Ct.*, 824 A.2d at 233 (defining aggravated circumstances).

²³⁴ *In re E.L.*, 707 N.W.2d at 847.

²³⁵ KY. REV. STAT. ANN. § 600.020 (54) (2006).

²³⁶ See Paul Eric Stuhff, Comment, *Utah's Children: Better Protected Than Most by New Civil Sex Offender Incapacitation Laws?*, 24 J. CONTEMP. L. 295, 303 (1998); Christopher Champagne, *Sex Offender Registration and Notification Statutes & the Illinois Supreme Court's Decision in People v. Malchow*, 22 QLR 301, 307-98 (2003).

not merely complied with the reunification plan, would also deprive the child of the permanency essential to the child's health and safety.

Chronic Abuse. Chronic abuse, similar to torture, can include abuse that inflicts very serious harm immediately and thus irreparably. But the modifier that distinguishes this example is not "severe" or "egregious" or even "very serious"; it is "chronic." The plain meaning of chronic is "of long duration; continuing."²³⁷ Oklahoma defines the phrase in its child abuse statute to be "a pattern of physical or sexual abuse . . . which is repeated or continuing."²³⁸ Beyond "repeated" or "continuing," however, chronic also suggests intractable or resistant to change. The Rhode Island Supreme Court, in a case involving a termination of parental rights, said, for example: "With respect to the finding of unfitness because of chronic substance abuse, this Court has defined the term chronic as '[w]ith reference to diseases, of long duration, or characterized by slowly progressive symptoms; deep seated and obstinate, or threatening a long continuance * * *.'"²³⁹ The danger in chronic abuse resides in its ongoing and intractable nature. Providing reunification efforts for a child and parent when the parent has chronically abused the child predicts a long foster stay for the child.

Abandonment. What Congress intended by including abandonment as an example of aggravated circumstances is somewhat more difficult to discern from plain meaning. In family law its meaning can range from abandoning a newborn infant at a hospital or

²³⁷ HERITAGE DICTIONARY, *supra* note 230, at 250.

²³⁸ OKLA. STAT. TIT. § 7001-1.3(A)(8) (2007). *See also* Virginia's definition: "recurring acts of physical abuse that place the child's health, safety and well-being at risk." VA. CODE. ANN. § 16.1-281(B) (2008).

²³⁹ *In re Shawn M.*, 898 A.2d 102, 107 (R.I. 2006) (citing *In re Tara P.*, 836 A.2d 219, 223 (R.I. 2003) (quoting *In re Suebun V.*, 766 A.2d 939, 943 (R.I. 2001) and BLACK'S LAW DICTIONARY 941-42 (6th ed. 1990)).

elsewhere,²⁴⁰ to failing to pay child support,²⁴¹ to failing to visit or otherwise maintain contact.²⁴² In some states, a man's failure to register on a putative father registry is prima facie evidence that the father has abandoned his child.²⁴³ In addition, the distinction between abandonment and child neglect can sometimes blur; failing to provide basic care and support for a child can constitute either abandonment or neglect.²⁴⁴ Abandonment in

²⁴⁰ "Abandoned infant[s]" are explicitly listed in ASFA as circumstances requiring the state to file a termination of parental rights petition. ASFA § 103(a), 42 U.S.C. § 675(5)(E). Because section 675(5)(E) includes some but not all circumstances covered by section 671(a)(15)(D) (exceptions to reasonable efforts), the difference in phrasing is presumably intentional and "abandonment" in 671(a)(15)(D)(i) is meant to be more inclusive than "abandoned infant[s]." ASFA leaves the definition of "abandoned infant" to the states. ASFA § 103(a), 42 U.S.C. § 675(5)(E).

²⁴¹ See *Young v. Foster*, 252 S.E.2d 680, 739 (Ga. Ct. App. 1979) (stating "nonpayments were intentional and constituted a voluntary abandonment"); *In Interest of R.K.B.*, 572 N.W.2d 600, 602 (Iowa 1998) (discussing legislative intent that termination for nonpayment can occur when nonpayment manifests indifference to the child).

²⁴² See *Z.H. v. G.H.*, 5 S.W.3d 567, 570 (Mo. Ct. App. 1999) (state statute provides that abandonment occurs if, for a period of six months or longer, the parent left the child without parental support and made no efforts to visit, with no good cause to do so and while having the means to visit); *In re Roshawn R.*, 720 A.2d 1112, 1117 (Conn. App. Ct. 1998) (holding that because of father's lack of contact with children while in prison and his failure to utilize services to see his children while not incarcerated, the lower court properly held he had abandoned his children); see also *Williams*, 130 P.3d at 806 n.4 (noting that incarceration, without more, did not constitute aggravated circumstances; the court did note "at first glance" incarceration of a parent might be included with abandonment, but that the father had not argued this).

²⁴³ Robbin Pott Gonzalez, *The Rights of Putative Fathers to Their Infant Children in Contested Adoptions: Strengthening State Laws That Currently Deny Adequate Protection*, 13 MICH. J. GENDER & L. 39, 65, 65 n.155 (2006) (listing Illinois, Minnesota, Nebraska, and Utah).

²⁴⁴ See *In re Monique H.*, 681 N.W.2d 423, 428-429 (Neb. App. Ct. 2004) (holding the abandonment found by the trial court was not that contemplated by the reasonable efforts exception in the Nebraska statute):

It is clear . . . that the court adjudicated Monique not only on the basis that she is an abandoned child, but also on the basis that she lacks proper parental support and parental care. In family law, the terms "abandoned" and "abandonment" can include many forms of child neglect, and the lines of distinction between the two are not always clear, so that failure to support or care for a child may sometimes be characterized as abandoning a child and sometimes characterized as neglect. [citation omitted].

abuse and neglect law, however, normally requires an “intent to relinquish parental claims to the child.”²⁴⁵ As stated by the Kentucky Court of Appeals, “Generally, abandonment is demonstrated by facts or circumstances that evince a settled purpose to *forego all parental duties and relinquish all parental claims* to the child. Parental non-support does not itself constitute abandonment, especially where the child is supported by a volunteer, but it may be an element of abandonment.”²⁴⁶ More recently, the Alabama Court of Appeals had to apply Alabama’s statutory definition of abandonment in an aggravated circumstances case.²⁴⁷ The statutory definition included “the failure to claim the rights of a parent, or failure to perform the duties of a parent.”²⁴⁸ In spite of the language of the statute, the court held that “involuntary, unintentional, and/or justifiable parental conduct”²⁴⁹ would not support a finding of abandonment.²⁵⁰

Abandonment, then, to the extent that it is separate from traditional abuse, neglect, and failure to care situations, would likely be a parent who has, without good cause or excuse: left a child, or left a child with someone, and failed to return; failed to maintain contact with the child; or otherwise failed to do what is necessary to keep alive his or her

²⁴⁵ Gregory, *supra* note 174, at 186.

²⁴⁶ O.S. v. C.F., 655 S.W.2d 32, 34 (Ky. Ct. App. 1983) (emphasis added).

²⁴⁷ H.H. v. Dept.of Human Resources, 989 So. 2d 1094 (Ala. Civ. App. 2007).

²⁴⁸ *Id.* at 1104 (quoting ALA. CODE § 26-18-3(1) (1992)).

²⁴⁹ *Id.* at 1103-04.

²⁵⁰ *Id.* The mother in the case did not have contact with the child protective services, nor did she physically visit the child between Nov. 2005 and April 2006, and the juvenile court found that she had “abandoned” her child. The appellate court concluded that there was not clear and convincing evidence that the mother had “intentionally, voluntarily, and unjustifiably failed to claim the rights of a parent; failed to perform the duties of a parent; or withheld her presence, care, love, protection, maintenance, or the opportunity for the display of filial affection.” *Id.* at 1104.

parental claims or parent-child relationship.²⁵¹ Certainly such conduct can result in very serious harm or detriment to a child if reunification efforts are made. Because the details of the abandonment can vary greatly, however, the presumption of harm probably depends more on the specific circumstances than does the presumption stemming from torture, sexual abuse, or chronic abuse. Nevertheless, reunification efforts with a parent who has abandoned a child can suggest a likelihood that the child might be very seriously and irreparably harmed, either directly by the parent if returned prematurely, or by a lengthy stay in foster care if made to await the parent's remediation.

In addition to considering the examples listed, it is also worth noting Congress did not include chronic neglect. Its absence highlights the intentional and affirmative nature of the examples provided. The Maine Supreme Court, however, was quick to recognize neglect and nonaffirmative conduct as a basis for bypassing reasonable efforts when construing the state's aggravated circumstances exceptions.

²⁵¹ As mentioned, ASFA requires that a termination of parental rights petition be filed when the abandoned child is an "abandoned infant." ASFA § 103(a), 42 U.S.C. § 675(5)(E). Abandoned infants are often sorted out for individual treatment in state abuse and neglect statutes. *E.g.*, Arkansas defines "abandoned infant" and "abandonment" as follows:
(1) "Abandoned infant" means a juvenile less than nine (9) months of age whose parent, guardian, or custodian left the child alone or in the possession of another person without identifying information or with an expression of intent by words, actions, or omissions not to return for the infant;
(2) "Abandonment" means the failure of the parent to provide reasonable support and to maintain regular contact with the juvenile through statement or contact when the failure is accompanied by an intention on the part of the parent to permit the condition to continue for an indefinite period in the future and failure to support or maintain regular contact with the juvenile without just cause or an articulated intent to forego parental responsibility.
ARK. CODE ANN. § 9-27-303(1), (2) (2008). In addition, many states have "safe haven" laws that apply to the abandonment of infants under appropriate conditions, *e.g.*: MONT. CODE ANN. § 40-6-417 (2007).

In *In re Ashley*, the parent had argued that Maine’s aggravated circumstance exception required affirmative conduct.²⁵² The statutory definition provided, in part, that the state was not required to use reasonable efforts when the parent had “‘subjected the child to aggravated circumstances including, but not limited to . . . [r]ape, gross sexual misconduct, gross sexual assault, sexual abuse, incest, aggravated assault, kidnapping, promotion of prostitution, abandonment, torture, chronic abuse or any other treatment that is heinous or abhorrent to society.’”²⁵³ The father argued his actions were only those of gross neglect. Because the statutory examples encompassed only affirmative and criminal acts, he argued, his actions failed to satisfy the statutory phrase relied on by the trial court, “‘treatment that is heinous or abhorrent to society,’”²⁵⁴ for its findings of aggravated circumstances.

The Supreme Court disagreed, ruling that both action and inaction qualified as aggravating factors under the statute. The court emphasized both the “subjected to” language of the statute and the statute’s use of the word “treatment.” While acknowledging that “[n]eglect, that is, the failure to undertake the necessary and appropriate actions to keep children safe and well cared for, will rarely constitute the heinous or abhorrent treatment envisioned by the Legislature,” the court found that there was “no question . . . that the severe neglect to which the father subjected Ashley and her infant brother” qualified.²⁵⁵ The court noted Ashley and her two-month-old brother were “ignored for

²⁵² *In re Ashley*, 762 A.2d 941, 947 (Me. 2000).

²⁵³ *Id.* at 946 (quoting 22 ME. REV. STAT. ANN. § 4002(1-B)(A)(1), currently § 4002(1-B)(A)(1) (Supp. 2007)).

²⁵⁴ In effect, the father argued *eiusdem generis*. See *supra*, note 51 for definition of *eiusdem generis*.

²⁵⁵ *In re Ashley*, 762 A.2d at 947. See also *Risland*, 51 P.3d at 705, in which the Oregon Court of Appeals also concluded that aggravated circumstances, as defined by its

hours, if not for days, in a shockingly unsanitary environment. They sat in their own excrement, unattended, unfed, and unwashed. They received no human contact for hours on end.”²⁵⁶ The two-month-old had been put to bed in his car seat, which was placed in his bassinet. From approximately 11:00 that evening until 1:00 the following afternoon, no one tended to the baby’s needs. The mother called around 1:15 p.m. to report her baby had died in his sleep.²⁵⁷

ASFA’s legislative history does not appear to contradict the Maine court’s conclusion. Further, while most specific references are to affirmative acts, there are scattered references to neglect,²⁵⁸ and child advocates who appeared in Congressional hearings also referred to circumstances that could constitute neglect, and specifically chronic neglect. Especially emphasized were substance addictions, e.g., Michigan’s Lieutenant Governor Connie Binsfeld argued no reasonable efforts should be required in chronic circumstances – when “multiple attempts have been made to rehabilitate the family or when substance abuse has been ongoing and has resulted in previous harm to the children and the addiction has proved to be intractable even with the appropriate treatment.”²⁵⁹ Similar views were expressed by child advocates Peter Digre²⁶⁰ and Albert

legislature, was not limited to intentional conduct and included neglect. In Oregon, however, the court noted that the legislature had listed two examples of aggravated circumstances that could include nonintentional conduct, “‘neglect’ resulting in a child’s death or serious physical injury.”

²⁵⁶ *In re Ashley*, 762 A.2d at 947-48.

²⁵⁷ *Id.* at 943-44.

²⁵⁸ *See, e.g.*, 143 CONG. REC. H2012-06, H2013 (daily ed. April 30, 1997) (statement of Rep. Pryce) (commenting that the legislation protects children who, “through no fault of their own are unable to return to their natural parents,” either because of abuse or neglect).

²⁵⁹ *Barriers to Adoption*, *supra* note 98, at 33 (statement of Gov. Binsfeld) (also stating it “would be very helpful to the States if [Congress would] define ‘reasonable efforts,’ *id.* at 37). Binsfeld, as part of her testimony, shared the results of Michigan’s Special Commission on Adoption for allowing a bypass of reasonable efforts. She also talked

J. Solnit.²⁶¹ Digre argued that reasonable efforts made no sense for “parents with long-term and chronic addictions.”²⁶² Solnit noted it was “too late for family preservation” when “the child has already been . . . severely neglected to the degree that it is life-threatening or leads to serious physical impairment.”²⁶³

State legislative definitions are also largely consistent with the Maine Supreme Court’s holding in *In re Ashley*. Some states have explicitly included chronic neglect as a basis for allowing discretionary bypass of reasonable efforts, e.g., Oklahoma and South Dakota.²⁶⁴ More often, however, states have qualified their neglect grounds with specific “aggravating” factors, e.g., Indiana requires criminal neglect (“A parent has been convicted of neglect of a dependent”);²⁶⁵ Alaska requires a “substantial physical harm” as a result of the neglect;²⁶⁶ Kansas requires “life-threatening” neglect;²⁶⁷ and Montana requires “severe” neglect.²⁶⁸ Thus while including some form of neglect as an aggravating circumstance,

about the harm to children left in foster care while the state provided efforts to rehabilitate parents who had committed egregious crimes against the children or their siblings. *Id.* at 32-33.

²⁶⁰ Digre was then the Director of the Los Angeles County Department of Children and Family Services. *Id.* at 110.

²⁶¹ Solnit was then a Senior Research Scientist for the Yale University Child Study Center and Commissioner for the Connecticut Department of Mental Health. *Hearing before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 104 Cong. 95 (1997) (statement of Albert J. Solnit, M.D.) [hereinafter *Hearing Solnit*].

²⁶² *Barriers to Adoption*, *supra* note 98, at 116 (statement of Peter Digre, Director of the Los Angeles County Dept. of Children and Family Services).

²⁶³ *Hearing Solnit*, *supra* note 261, at 97.

²⁶⁴ OKLA. STAT. TIT. 10, § 7003-4.6 (2007) (“The parent . . . has inflicted chronic abuse, chronic neglect or torture on the child, sibling or the child or another child within the household”); S.D. CODIFIED LAWS § 26-8A-21.1(3)(2003) (the parent “[h]as subjected the child or another child to torture, sexual abuse, abandonment for at least 6 months, chronic physical, mental or emotional injury, or chronic neglect”).

²⁶⁵ IND. CODE § 31-34-21-5.6 (2007).

²⁶⁶ ALASKA STAT. § 47.10.086 (2006).

²⁶⁷ KAN. STAT. ANN. § 38-2202(c) (Supp. 2007).

²⁶⁸ MONT. CODE. ANN. § 41-3-423(2)(a) (2007).

states have also recognized the need to include only those circumstances that reflect very serious harms, either because of the very serious and immediate harm that may be inflicted or when the chronic nature of the neglect forecasts a long term foster stay for the child before the court.

B. “[S]ubjected the child to aggravated circumstances”

When faced with the explicit task of applying the aggravated circumstances exception, most courts agree that to be “aggravated,” the situation, like ASFA’s examples, must reflect conduct or harm that is more than serious. The Oregon Court of Appeals examined the aggravated circumstances phrase in 2002, in Oregon’s similarly worded statute,²⁶⁹ and concluded the phrase required “circumstances . . . involving relatively more serious types of harm or detriment to a child.”²⁷⁰ One year later, New Jersey’s intermediate appellate court similarly examined, along with other factors,²⁷¹ the ordinary meaning of the phrase.²⁷² The court considered “any circumstances that increase the severity of the abuse

²⁶⁹ *Risland*, 51 P.3d at 705 (Oregon Court of Appeals construing OR. REV. STAT. ANN. § 419B.340(5)(a), currently at § 419B.340(5)(a) (2007)). While *Risland* did not refer to ASFA, the same court recognized the ASFA origins of the phrase in a later opinion. See *Williams*, 130 P.3d at 805.

²⁷⁰ *Risland* 51 P.3d at 705.

²⁷¹ The court interpreted New Jersey’s ASFA provisions by looking at the language used, the purpose of the legislation, and the statutory context of the phrase. *A.R.G. Super. Ct.*, 824 A.2d at 224-234.

²⁷² The New Jersey statute excepted aggravated circumstances by providing that no reasonable efforts were required when “[t]he parent has subjected the child to aggravated circumstances of abuse, neglect, cruelty or abandonment.” *A.R.G. Super. Ct.*, 824 A.2d at 219 (quoting N. J. STAT. ANN. § 30:4C-11.3, currently at § 30:4C-11.3 (2008)). The court noted that the New Jersey legislature “has chosen to use the term ‘aggravated circumstances’ as a modifier of ‘abuse, neglect, cruelty or abandonment.’ Stated another way, it appears that the degree, or extent, of the ‘abuse, neglect, cruelty or abandonment’ would seemingly determine whether ‘aggravating circumstances’ are present.” *A.R.G. Super. Ct.*, 824 A.2d at 227.

or neglect, or add to its injurious consequences, [to] equate[] to ‘aggravated circumstances.’”²⁷³

That aggravated means something worse than the typical but still serious abuse or neglect case is fairly apparent. The meaning and impact of “subjected the child to,” as well as “circumstances,” however, is less so. These phrases are not used in the CAPTA and TPR exceptions. Their use thus distinguishes the aggravated circumstances exception and consequently their meaning and impact are important to consider.

As noted earlier, except for CAPTA’s felony circumstance,²⁷⁴ both the CAPTA and TPR provisions rely upon the validity of the presumption that a parent who has caused or allowed “another child” to be harmed will also cause harm to the child before the court should reunification efforts be made. The provisions further require no specific evidence concerning the child before the court, e.g, that the prior incident was so recent the parent still presents a risk to the current child. The presumed risk to the subject-child is derived solely from a specific, concrete, and very serious harm, either a CAPTA act or an involuntary TPR, which the parent inflicted upon the other child. In contrast, the aggravated circumstances exception relies upon the validity of a presumption that a parent who has previously created aggravated circumstances concerning “the child” before the court will harm the same child in the future if reunification efforts are provided. The

²⁷³ *A.R.G. Super. Ct.*, 824 A.2d at 233. The court focused on whether the circumstances would create an unacceptably high risk to the health, safety and welfare of the child; if so, they are “aggravated,” and thus reasonable efforts may be bypassed. *A.R.G. Super. Ct.*, 824 A.2d at 233. The court concluded that “‘aggravated circumstances’ embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child, and would place the child in a position of an unreasonable risk to be abused.” *Id.*

²⁷⁴ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D)(ii) (when a parent has “committed a felony assault that results in serious bodily injury to the child or another child of the parent”).

predicted future harm is thus explicitly derivative only in the sense that a prior circumstance concerning the subject-child is used to predict a future harm to the same child.

On the other hand, the aggravated circumstances exception is triggered not only when the child before the court has been directly harmed by the aggravated circumstances – when the child has been tortured, for example – but also when the child has been “subjected” to the aggravated circumstance.²⁷⁵ This language raises the question of whether the aggravated circumstances can be derived from a situation involving another child of the parent, and if so, how closely linked to the subject-child those circumstances must be. The New York Court of Appeals directly faced at least the first part of this question in 2003 in a termination of parental rights case, *In re Marino*,²⁷⁶ and agreed with both lower courts in the case, holding that the aggravated circumstances need not be directly inflicted upon the subject-child, but can instead be derived from circumstances involving another child.

In *Marino*, Shaina, the eldest of the mother’s three children, was raped by the man who had fathered her two younger siblings and who lived with her mother.²⁷⁷ The New York Family Court found that the mother had “severely abused” Shaina, by knowingly allowing her to be raped and by delaying medical treatment and thus endangering her

²⁷⁵ Domestic violence directed at an adult in the household could also qualify, so long as the violence is shown to be an aggravated circumstance to which the child has been subjected. See *Marino Fam. Ct.*, 693 N.Y.S.2d at 831.

²⁷⁶ *Marino Ct. App.*, 795 N.E.2d at 23.

²⁷⁷ *Marino Fam. Ct.*, 693 N.Y.S.2d at 828.

life,²⁷⁸ and also relied upon the severe abuse of Shaina to support its finding of aggravated circumstances concerning the younger children.²⁷⁹

New York's then newly enacted statutory scheme included exceptions to reasonable efforts similar to ASFA's. For example, no reasonable efforts were required when the parent of the child before the court had murdered another child of the parent; no efforts were required if the parent's rights to a sibling of the child before the court had been terminated; and no efforts were required if the parent had committed any of several specified assaults resulting in injury to the child before the court or injury to another child of the parent.²⁸⁰ Additionally, New York's statutes included an aggravated circumstances exception, using ASFA's language, allowing reasonable efforts to be bypassed when the parent had "subjected the child to aggravated circumstances."²⁸¹ Finally New York defined aggravated circumstances to mean, among other things, "severe abuse."²⁸²

The parents focused on the severe abuse provisions. Only the first two of the three definitions of severe abuse encompassed the abuse facts in *Marino*, and both of those referred only to circumstances directly involving "the child":

²⁷⁸ *Id.* at 822.

²⁷⁹ *Marino Ct. App.*, 795 N.E.2d at 26. *See Marino Fam. Ct.*, 693 N.Y.S.2d at 830 (discussing derivative findings of abuse).

²⁸⁰ N.Y. FAM. CT. ACT, Art. 10, Part 3, §1039-b(b) (McKinney Supp. 2008). Section 1039b-(b) further provided that if any of the exceptions exist, reunification efforts are "not required unless the court finds 'that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future.'" *Marino Fam. Ct.*, 693 N.Y.S.2d at 828 (quoting N.Y. FAM. CT. ACT, Art. 10, Part 3, §1039-b(b) (McKinney Supp. 2008)).

²⁸¹ N.Y. FAM. CT. ACT, Art. 10, Part 3, §1039-b(b)(1) (McKinney Supp. 2008).

²⁸² *Marino Fam. Ct.*, 693 N.Y.S.2d at 832 (quoting and construing N.Y. FAM. CT. ACT, Art. 10, Part 1, § 1012(j) (referencing N.Y. SOCIAL SERVICES LAW § 384-b(8)) (additional language was added to the definition of § 1012(j) in 2005).

(i) *the child* has been found to be an abused child as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life, which result in serious physical injury to *the child* . . . ; or

(ii) *the child* has been found to be an abused child [as defined elsewhere] as a result of such parent's acts; provided, however, the respondent must have committed or knowingly allowed to be committed a felony sex offense [as defined elsewhere]²⁸³

Thus, argued the parents, the severe abuse and thus the aggravated circumstances covered only Shaina, not her siblings.²⁸⁴ The third definition of severe abuse explicitly recognized derivative abuse, deeming the child before the court to be severely abused if the parent had committed murder, manslaughter, assault, or aggravated assault of another child of the parent.²⁸⁵ Because of what the Court of Appeals described as an anomaly, however, this provision was not applicable to the assault of Shaina, a “violent rape causing life-threatening injuries.”²⁸⁶

Said the Court of Appeals, “We refuse to read the absence of specific references to siblings in [(i) and (ii)]” as preventing derivative findings of abuse.²⁸⁷ “It would be unthinkable to interpret the Social Services law so that a derivative finding can be made when a parent assaults a sibling, but not when the parent rapes a sibling or seriously injures her under circumstances evincing a depraved indifference to her life.”²⁸⁸ Thus while

²⁸³ N.Y. SOCIAL SERVICES LAW § 384-b(8)(a)(i-ii) (McKinney Supp. 2008).

²⁸⁴ *Marino Ct. App.*, 795 N.E.2d at 28.

²⁸⁵ N.Y. SOCIAL SERVICES LAW § 384-b(8)(a)(iii) (McKinney Supp. 2008).

²⁸⁶ *Marino Ct. App.*, 795 N.E.2d at 29 (“Anomalous though it may seem, however, this subparagraph was not triggered in the present case because the conduct at issue was violent rape causing life-threatening injuries, and not homicide or assault.”) (construing N.Y. SOCIAL SERVICES LAW § 384-b(8)(a)(iii) (McKinney Supp. 2008)).

²⁸⁷ *Marino Ct. App.*, 795 N.E.2d at 29.

²⁸⁸ *Id.*

Shaina was the only direct victim of severe abuse, the court affirmed that the siblings were severely abused and thus subjected to aggravated circumstances.²⁸⁹

Much of the reasoning in *Marino* supports derivative findings for ASFA's aggravated circumstances exception. In *Marino*, one definition of severe abuse explicitly recognized derivative abuse and the Court of Appeals relied on this to support its rationale to extend derivative abuse to the first two definitions.²⁹⁰ In ASFA, both the CAPTA and TPR exceptions explicitly encompass derivative abuse, suggesting derivative abuse should be recognized for the aggravated circumstances exception also.²⁹¹ Additionally, the language of ASFA's aggravated circumstances exception differs in another way from its CAPTA and TPR counterparts, and in a way that is consistent with recognizing derivative abuse or harm. The aggravated circumstances exception requires that the child before the court only be "subjected" to those circumstances. Unlike the New York statutory provisions, ASFA does not include any specific definitions for aggravated circumstances requiring that "the child" before the court be a direct victim of the abuse or neglect. The suggested definitions for aggravated circumstances are listed as "abandonment, torture, chronic abuse, and sexual abuse," but nothing requires these to be directed at the subject-child. Even for the felony circumstance in the CAPTA exception, ASFA allows an exception to required reasonable efforts for the child before the court if the felony assault resulted in serious bodily injury to either the child or another child of the parent.

²⁸⁹ *See id.*

²⁹⁰ *See id.*

²⁹¹ Except for the felony circumstance, all of the CAPTA and TPR circumstances rely on the direct abuse of one child of the parent to trigger the presumption that the child before the court will also be abused. ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D)(ii), (iii).

Finally, as each of the three *Marino* courts noted – the Family Court, the Court of Appeals, and the Supreme Court – ASFA is premised upon and relies upon the validity of derivative harms.²⁹²

“[S]ubjected the child to” does indicate, however, that the circumstances must, in some way, be related to the child before the court. The New York Court of Appeals’ analysis does not explicitly address the degree to which “subjected to” requires the state to demonstrate that the aggravated circumstances evince harm, or risk of harm, to the child before the court.” But the Court implicitly acknowledges there must be some connection. Its decision relies on the fact that “courts have consistently sustained derivative findings where a [parent’s] abuse of [one] child is so closely connected with the care of another child as to indicate that the second child is equally at risk”²⁹³ and further, that “children who are not themselves the direct targets of abuse may, *in accordance with the proof*, suffer damage from witnessing the severe abuse of their siblings.”²⁹⁴

Further, a 2007 New York Family Court decision, *In re William S.*,²⁹⁵ also suggests the lack of a connection would require the state to provide reasonable efforts to the child before the court. *William S.* emphasized that New York’s statute allowing aggravated circumstances (or any other circumstances) to excuse reasonable efforts, is subject to a

²⁹² See *supra* text accompanying notes 188-95.

²⁹³ *Marino Ct. App.*, 795 N.E.2d at 28.

²⁹⁴ *Id.* at 28-29 (emphasis added). One of the children found to have been derivatively abused was in the same bed when her father raped Shaina. *Id.* The *Marino* trial court similarly noted that children who are not direct targets are likely to be harmed by a parent who has already harmed another in his or her care, and that they are also like to suffer from seeing their sibling mistreated. The trial court also observed that derivative findings were “similar to findings of neglect based upon domestic violence between adults within the child’s home when no physical injury to the child has occurred.” *Marino Fam. Ct.*, 693 N.Y.S.2d at 831.

²⁹⁵ *In re William S.*, 832 N.Y.S.2d 783, 785 (N.Y. Fam. Ct. 2007)

statutory “unless” provision: “unless the court determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future.”²⁹⁶ This provision, ruled the family court, places the ultimate burden of proof on the agency seeking to deny reasonable efforts, a burden to show “that reasonable efforts are not in the child’s best interest.”²⁹⁷ In *Marino*, noted the *William S.* court, the parents were given “full opportunity” to come forward with evidence to support their contention that reasonable efforts should be provided.²⁹⁸ Presumably if the aggravated circumstances were not sufficiently connected to the child before the court, New York would require reasonable efforts.

The specific language of the CAPTA and TPR exceptions, however, does not require any connection or proof of harm to the subject-child, nor does the language of the aggravated circumstances exception clearly require child-specific harm to the subject-child.²⁹⁹ Language in an earlier version of the legislation perhaps came close to a child-specific harm requirement, allowing states to forego reasonable efforts when there are “serious circumstances that endanger a child’s health or safety.”³⁰⁰ But otherwise,

²⁹⁶ *Id.* at 785 (quoting N.Y. FAM. CT. ACT, Art. 10, Part 3, §1039-b(b) (McKinney Supp. 2008)).

²⁹⁷ *Id.* at 787 (citing *In re Sarah*, 2003 WL 1923540 (N. Y. Fam. Ct. 2003)).

²⁹⁸ *Id.* at 785-86 (citing *Marino Ct. App.*, 795 N.E.2d 21).

²⁹⁹ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D)(i), (ii), (iii). One could argue that without proof that the child in question would suffer harm, providing reunification efforts would presumably be in the best interest of the child and thus consistent with ASFA’s mandate, that “in determining reasonable efforts to be made . . . the child’s health and safety shall be the paramount concern.” ASFA § 101(a), 42 U.S.C. § 671(a)(15)(A). Further, New York does require this. *See supra* text accompanying notes 295-298.

³⁰⁰ 143 CONG. REC. S12183, S12183 (daily ed. Nov. 8, 1997) (amendment by Sen. Craig to H.R. 867, § 101(a), 105th Cong., providing that reasonable efforts shall not be required “if the State, through legislation, has specified cases in which the State is not required to make

legislative history yields very few specifics on this issue. Two state courts, however, in Oregon and New Jersey, have considered the relevance of specific harm to the child before the court.

The argument before the Oregon Court of Appeals in *State v. Risland*,³⁰¹ discussed earlier, was limited to whether the specific effects of the circumstances on the child before the court *may* be considered to establish aggravated circumstances. The court’s opinion, however, provides a basis for arguing that the effects on the child *must* be considered if relevant to an argument against aggravated circumstances.

The Oregon court relied heavily on the legislature’s use of the word “circumstances” to conclude that the results on the child, both direct and indirect, could be considered when determining if aggravated circumstances existed.³⁰² The court ruled that the aggravated circumstances exception applied and specifically found relevant the harm suffered by the child before the court and the failure of prior remediation efforts directed at

reasonable efforts because of serious circumstances that endanger a child’s health or safety”).

³⁰¹ *Risland*, 51 P.3d at 705.

³⁰² *Id.* The Oregon statute considered was different from ASFA in a couple of respects. First, the statute allowed a bypass of reasonable efforts when aggravated “circumstances exist.” OR. REV. STAT. ANN. §§ 419B.340(5), (5)(a)(a) (2007) (emphasis added). While “subjected to” is included in some of the listed examples of aggravated circumstances – e.g., “the parent has subjected any child to intentional starvation or torture” – it is not specifically used with the broader term “aggravated circumstances.” *Id.* at § 419B.340(5)(a)(E). Further, the Oregon court also explicitly noted the legislature’s use of “any” child in some of the enumerated aggravated circumstances exceptions as contributing to its understanding of “circumstances,” *Risland*, 51 P.3d at 705, e.g., “[t]he parent by abuse or neglect has caused the death of any child,” OR. REV. STAT. ANN. § 419B.340(5)(a)(A). The court relied on this to include within aggravated circumstances other, non-enumerated circumstances with “‘any’ child, not merely the child who is the subject of the dependency petition.” *Risland*, 51 P.3d at 705. Consistent with this, the court included in its “circumstances” considered, that the subject-child’s sibling had “suffered severe mental injury as a result of his exposure to significant domestic violence, the parents’ drug use, and a highly unstable home life.” *Id.*

the parents.³⁰³ A comment at the conclusion of its decision also suggests that these additional effects must be considered, as they may establish the lack of aggravated circumstances: “We caution that, in concluding that the circumstances here are ‘aggravated’ . . . , we do not rely solely on the parents’ actions and conditions. As [the] father observes, the nature and scope of the parents’ problems are not unlike many examples of parental circumstances that would support the court’s dependency jurisdiction yet still require [the child protection agency] to make further reasonable efforts to reunify the family.”³⁰⁴

The more specific issue of whether a court *must* consider the effects on the subject-child when the state seeks to excuse reasonable efforts based on aggravated circumstances was raised by a dissenting opinion in a New Jersey Superior Court case.³⁰⁵ *In re A.R.G.*³⁰⁶ involved three children who were the subject of abuse and neglect complaints filed against the father.³⁰⁷ The trial court had excused the child protection agency from reasonable efforts for all of the children, holding that the middle child had been severely abused and that the other two children were at risk for abuse.³⁰⁸ The superior court, in a split decision, affirmed;³⁰⁹ the Supreme Court affirmed in part, but only after “elucidating” the superior court’s standard.³¹⁰ The discussions in the superior court’s majority and dissenting opinions, as well as the subsequent New Jersey Supreme Court opinion, are instructive.

³⁰³ *Risland*, 51 P.3d at 705-06.

³⁰⁴ *Id.* at 706.

³⁰⁵ *A.R.G. Super. Ct.*, 824 A.2d at 239-40 (Eichen, J.A.D., dissenting).

³⁰⁶ *A.R.G. Super. Ct.*, 824 A.2d 213.

³⁰⁷ *Id.* at 216, 221.

³⁰⁸ *Id.* at 221, 223.

³⁰⁹ *A.R.G. Super. Ct.*, 824 A.2d 213.

³¹⁰ *A.R.G. Sup. Ct.*, 845 A.2d at 119-20.

Because New Jersey had not provided a legislative definition of aggravated circumstances,³¹¹ Judge Robert Fall’s majority opinion focused on ASFA, its purpose, and its language to determine the meaning of the phrase.³¹² The opinion concluded that ASFA’s aggravated circumstances exception “embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child, and would place the child in a position of an unreasonable risk to be reabused.”³¹³ Like the Oregon court in *Risland*,³¹⁴ the superior court’s majority also read ASFA’s provision to allow circumstances beyond parental conduct to be considered when assessing the situation for aggravated circumstances, e.g., “whether the offer or receipt of services would correct the conditions that led to the abuse or neglect within a reasonable time.”³¹⁵ The opinion noted that two of the three children in the case before the Court had had been beaten by the father, the middle child “repeatedly” and once “savage[ly],”³¹⁶ and while acknowledging that even the middle

³¹¹ *A.R.G. Super. Ct.*, 824 A.2d at 226-67.

³¹² *Id.* at 224-234. Fall provided an extensive review of how other states had dealt with ASFA’s aggravate circumstance exception. *Id.* at 227-232. The review showed a focus on past or present circumstances or harm, e.g., Maine’s definition: “[r]ape, gross sexual misconduct, gross sexual assault, sexual abuse, incest, aggravated assault, kidnapping, promotion of prostitution, abandonment, torture, chronic abuse or any other treatment that is heinous or abhorrent to society,” *Id.* at 230-31 (quoting ME. REV. STAT. ANN. tit. 22 § 4002(1-B)(A)(1) (brackets in original; other editing marks and emphasis omitted), currently at title 22 § 4002(1-B)(A)(1) (Supp. 2007), and Missouri’s: “[t]he parent has subjected the child to a severe act or recurrent acts of physical, emotional or sexual abuse toward the child, including an act of incest,” *A.R.G. Super. Ct.*, 824 A.2d at 231 (quoting MO. REV. STAT. § 211.183(7)(1) (brackets in orig-06.nal; other editing marks and emphasis), currently at § 211.183(7)(1) (2004)).

³¹³ *A.R.G. Super. Ct.*, 824 A.2d at 233.

³¹⁴ *Risland*, 51 P.3d at 706.

³¹⁵ *A.R.G. Super. Ct.*, 824 A.2d at 234. The opinion can also be read as stating that conduct alone may constitute “aggravated circumstances,” if the conduct is “particularly heinous or abhorrent to society.” *Id.* at 234.

³¹⁶ *Id.*

child had “suffered no broken bones or prolonged medical treatment,” the opinion observed that all three children had witnessed the father’s abuse of their mother.³¹⁷ The Court’s majority determined that the “totality of the evidence paints a vivid picture of the children and others in [the father’s] household being subjected to a violent and intimidating atmosphere,”³¹⁸ and held it was appropriate to refuse reasonable efforts to reunite the children with their father based on aggravated circumstances.

Judge Naomi Eichen explicitly raised in her dissent the issue of “whether conduct alone is sufficient to establish a case[,] . . . or whether the effect of that conduct *must* be factored into the equation.”³¹⁹ She argued that other, mitigating, factors should have been considered in *A.R.G.*, e.g., that the family “had no prior history of intervention” by the state’s child protection system and that there had been no psychological evaluation of the father to determine if services might remediate the problems that led to the abuse.³²⁰ Among her “serious reservations” with the majority opinion, one that echoed the Oregon Court of Appeals’ comment in *Risland*, was this: “[I]f the evidence underpinning the trial court’s decision in this case can be viewed as supporting a conclusion of ‘aggravated

³¹⁷ *Id.* at 234-35.

³¹⁸ *Id.* at 235.

³¹⁹ *Id.* at 240 (emphasis added) (Eichen, J.A.D., dissenting). Eichen’s dissent first criticized the trial court’s actions and the majority’s affirmance on due process grounds, *Id.* at 237 (Eichen, J.A.D., dissenting), but she also questioned the sufficiency of the evidence used to excuse reasonable reunification efforts: “[T]here was no medical testimony concerning the full extent and nature of the injury to [the middle child] from A.R.G.’s physical abuse Nor was there a psychological evaluation of [the middle child], or the other children, which might have afforded some insight into the emotional effects of the abuse.” *Id.* at 239 (Eichen, J.A.D., dissenting).

³²⁰ *Id.* at 240 (Eichen, J.A.D., dissenting).

circumstances of abuse,’ consider how many other cases alleging child abuse . . . could arguably fit within the [same] definition.”³²¹

The case was reviewed on appeal by the New Jersey Supreme Court, whose response was to set up two categories of aggravated circumstances – one where it is permissible to consider parental conduct alone and one where further inquiry is required.³²² Both categories first require, however, that the conduct be “severe or repetitive.”³²³ If not, aggravated circumstances cannot exist and reunification efforts are required.³²⁴

Assuming severe or repetitive conduct, the next inquiry should be whether the “abuse was of such a nature that standing alone, it compels the conclusion that reunification should not be required,” e.g., “where the conduct is particularly heinous or abhorrent to society, involving savage, brutal, or repetitive beatings, torture, or sexual abuse.”³²⁵ Here the Court’s language suggests a strict liability of sorts: “[T]he acts complained of, by their very nature[,] are[] so unnatural or depraved that the fundamental bond that is the basis of the reunification notion is deemed to be irremediably undermined.”³²⁶ If these circumstances exist, “the conduct may . . . be said to constitute ‘aggravated

³²¹ *Id.* at 239-40 (Eichen, J.A.D., dissenting). The majority’s response to Eichen’s dissent was that the father offered no “proofs or evidence” challenging the claim of aggravated circumstances and that “everything that could have been submitted was fully before the court.” *A.R.G. Super. Ct.*, 361 N.J. Super. at 81, 824 A.2d at 236.

³²² *A.R.G. Sup. Ct.*, 845 A.2d at 119.

³²³ *Id.* at 118.

³²⁴ *Id.*

³²⁵ *Id.* (quoting *A.R.G. Super. Ct.*, 824 A.2d at 234).

³²⁶ *A.R.G. Sup. Ct.*, 845 A.2d at 118. A student author refers to this, as used in New York cases, as the “fundamental defect” theory. See Robert May, Note, *Derivative Neglect in New York State: Vague Standards and Over-Enforcement*, 40 COLUM. J.L. & SOC. PROBS. 605, 614 (2007). One New York court described the situation as reflecting “such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the parents’] care.” *Id.* (quoting *Matter of Dutchess Co. Dept. of Social Services*, 661 N.Y.S.2d 670, 671 (N.Y. App. Div. 1997)).

circumstances,”³²⁷ and “the abusive parent’s future remedial efforts would be of no consequence.”³²⁸

The Court’s first category of cases seems to reflect circumstances similar to those in the CAPTA criminal acts exception: where a parent has inflicted a very serious harm; where the infliction was somewhat immediate; where the state would have little or no warning before a similar harm was inflicted if the subject-child were reunited with the parent; and where the state will likely remain unsure of change by the parent, even with the parent’s compliance.

For the Court’s second category of aggravated circumstances, circumstances beyond parental conduct must be considered, specifically the effect on the child and whether reunification efforts can sufficiently address the problem within a reasonable time.³²⁹ Examples that usually belong in this category are “abandonment, corporal punishment that does not result in permanent injury, [and] serious neglect and mental abuse.”³³⁰ These cases “require[] inquiry beyond the mere conduct of the parent,” to determine if the circumstances have “irremediably undermined the parent-child relationship” and thus “support the conclusion that reuniting the family will place the child at risk.”³³¹ Thus a court “may consider whether to admit expert testimony about the conduct and its relationship to the parent-child bond,” and “whether the parents’ remedial

³²⁷ *A.R.G. Sup. Ct.*, 845 A.2d at 118 (quoting *A.R.G. Super. Ct.*, 824 A.2d at 234).

³²⁸ *Id.* at 119.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

efforts are sufficient to eliminate an unreasonable risk of re-abuse.”³³² “It is the result of all of [these] inquiries that will determine whether reunification efforts are required.”³³³

Thus for New Jersey to deny reasonable reunification efforts in this second class of cases, a court must have evidence that specifically connects the parent’s conduct or circumstances to a harm or risk of harm to the child before the court. In effect, the Court requires a focus on the subject-child’s future health and safety, should reasonable efforts be required. While the Court does not otherwise specify the level of harm or the probability of the risk required, presumably each must be that which is evident from the conduct required in the first class of cases. Thus the harm must be serious enough to approximate a break of the “fundamental bond that is the basis of the reunification notion,”³³⁴ and it must also establish that reunification efforts will create a unacceptable and very serious risk to the child.³³⁵

The New Jersey Supreme Court’s treatment of its second category of cases is generally consistent with ASFA’s requirement at the outset of its clarification of reasonable efforts – that “in determining reasonable efforts to be made . . . , the child’s health and

³³² *Id.*

³³³ *Id.* at 119. The Court first discusses this additional evidence as “require[d]”, *i.e.*, that there is “another class of cases . . . that *requires* inquiry beyond the mere conduct of the parent.” Later the court discusses this evidence as something the court “may” consider, *i.e.*, “In [these] cases, the court *may* consider whether to admit expert testimony about the conduct and its relationship to the parent-child bond along with an assessment of whether the parents’ remedial efforts are sufficient to eliminate an unreasonable risk of re-abuse.” It is not fully clear, but one could read the Court’s full discussion to suggests “requires” is what the Court intended. *See id.* (emphasis added).

³³⁴ *Id.*

³³⁵ *See id.* at 118-19. Once the inquiry goes beyond the parental conduct and looks at other factors, the inquiry becomes whether reasonable efforts should be denied, in addition to whether reasonable efforts may be denied.

safety shall be the paramount concern.”³³⁶ In the first category, however, the exception applies without regard to any child-specific circumstances or harm concerning the child before the court. Because the New Jersey Supreme Court speaks of whether the exception applies, however, a court could still exercise the discretion, in either category, to provide reunification efforts if any evidence is introduced to suggest the presumption stemming from the aggravated circumstances is not valid. Indeed, ASFA’s mandate that the child’s health and safety is paramount, and its explicit directive that the child’s health and safety must be paramount when decisions about reasonable efforts are made, requires that the court consider not only circumstances that make the case for an exception, but also circumstances that make a case against a denial of reunification efforts.³³⁷

IV. Recommendations

As stated at the outset, I have no tidy solution for the individuals who must ultimately make such difficult decisions about the lives of children. I do, however, offer an analytical approach for determining whether to deny reunification efforts. My analysis assumes, as ASFA provides, that the health and safety of children must be paramount. It further recognizes, as does the reasonable efforts provision, that the harm that comes from a long-term disruption of the parent-child relationship, even with parents who are far from ideal, is almost always seriously detrimental to the child. Finally, it recognizes that without reunification assistance by the states, these troubled parents face an almost impossible task

³³⁶ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(A).

³³⁷ *Cf.* In re William S., 832 N.Y.S.2d at 786 (noting a child’s health and safety shall be the paramount concern when considering a request to deny reasonable efforts).

remediating their problems. Termination of parental rights, and a concomitant and very serious harm to the child is likely.

Accordingly, to approve a denial of reasonable efforts, a court (or other decision-maker) must not only require that the circumstances qualify under one of ASFA's exceptions, but also be satisfied that if reunification efforts are attempted, the child is likely to be very seriously harmed. To reach this point, the court must first find that a very serious harm has been created or caused by the parent of the child before the court. When determining the seriousness of this harm, any relevant factors should be considered, including derivative circumstances. There must, however, be a nexus between the harm the parent has already created and the harm predicted to the subject-child should reunification efforts be attempted. Finally, the predicted harm must be of sufficient magnitude to justify denying reasonable efforts.

Require a very serious harm at the outset. Both the CAPTA and the TPR exceptions apply to parents who have attempted to inflict, have inflicted, or have allowed to be inflicted very serious or severe harms upon their children. A court should be required to find a similar harm for the aggravated circumstances exception to apply.

The CAPTA and TPR exceptions have the advantage in this regard, of including only distinct and concrete situations or harms. The difficulty with the aggravated circumstances exception is that it must function as the catch-all, as the safety net for children affected by circumstances that make reunification efforts dangerous to their health and safety. An attempt to list the many aggravated circumstances that could justify the denial of reunification efforts has the advantage of definitiveness, but it risks leaving out

unanticipated circumstances or circumstances that are difficult to describe with sufficient specificity.

Even Congress, while providing its examples of aggravated circumstances (abandonment, torture, chronic abuse, or sexual abuse), cautioned that the exception was not to be limited to these situations. This wisdom was seemingly borne out by the severe circumstances of neglect in Maine’s *In re Ashley* case, where the two-month old infant died after being untended for “hours on end.”³³⁸ Further, as the case law, including *In re Ashley*, has made apparent, circumstances that might not qualify as “aggravated” in some situations – new parents who are overwhelmed, for example – should perhaps qualify in other situations.³³⁹ Thus instead of defining aggravated circumstances with an exhaustive list, a better approach is to define it by focusing on the level of harm required for circumstances to be aggravated.

The courts have provided some good guidance here, having agreed that something more than serious is required. While adjectives in abuse and neglect law must be read as relative, definitions always help. Serious encompasses “[g]rave,” “[n]ot trifling,” “[b]eing of such import as to cause anxiety.”³⁴⁰ Beyond serious is usually thought of as severe, which includes “[u]nsparing or harsh,” “causing sharp discomfort or distress; extremely violent or intense.”³⁴¹ Requiring a severe harm would limit the applicability of the exception and thus provide some relative clarity. But such a high threshold would also fail to capture what the New Jersey Supreme Court in *A.R.G.* identified as “another class of

³³⁸ *In re Ashley*, 762 A.2d at 948.

³³⁹ *Id.*

³⁴⁰ HERITAGE DICTIONARY, *supra* note 230, at 1245.

³⁴¹ *Id.* at 1248.

cases” where the health and safety of a child may require that reasonable efforts be denied.³⁴²

In addition to its first category of aggravated circumstances, those circumstances so “heinous or abhorrent to society, involving savage, brutal, or repetitive beatings, torture, or sexual abuse,”³⁴³ the New Jersey Supreme Court recognized a second category of less dire circumstances that are sometimes appropriate for a denial of reasonable efforts. These situations, “which may or may not have irremediably undermined the parent-child relationship and may or may not support the conclusion that reuniting the family will place the child at risk,”³⁴⁴ require a court to probe further to determine if the child will be at undue risk with reunification efforts.³⁴⁵

While the harmful circumstances for aggravated circumstances should be significant and therefore exceed serious, they should not be limited to the severe and “heinous” circumstances identified by *A.R.G.*³⁴⁶ Circumstances less dire, but still very

³⁴² *A.R.G. Sup. Ct.*, 845 A.2d at 119.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ The New Jersey Supreme Court’s language in *A.R.G.* recognizes that there may be two levels of aggravated circumstances, although the qualitative harm or detriment in its second level is not clear. Still, the court recognizes that the “aggravated” characteristic of some circumstances will be apparent, but for others further inquiry will be needed to determine if they meet the level of “aggravated.” The first level, the Court concludes, is “[where] the acts complained of, by their very nature are, so unnatural or depraved that the fundamental bond that is the basis of the reunification notion is deemed to be irremediably undermined.” This includes ““where the conduct is particularly heinous or abhorrent to society, involving savage, brutal, or repetitive beatings, torture, or sexual abuse,”” *A.R.G. Sup. Ct.*, 845 A.2d at 118 (quoting *A.R.G. Super. Ct.*, 824 A.2d at 234). For the second level, the court includes the examples of abandonment, corporal punishment that does not result in permanent injury, [and] serious neglect and mental abuse,” but notes that additional evidence “about the conduct and its relationship to the parent-child bond, along with an assessment of whether the parents remedial efforts are sufficient to eliminate an unreasonable risk of re-abuse.” *A.R.G. Sup. Ct.*, 845 A.2d at 118.

³⁴⁶ *A.R.G. Sup. Ct.*, 845 A.2d at 118.

serious, are a better compromise for a threshold harm that can preserve the reasonable efforts requirement, but also provide states with sufficient power to protect the health and safety of their children.

Consider all relevant circumstances. That Congress intended child protection agencies and courts to consider all relevant circumstances when determining if situations fit the aggravated circumstances exception is fairly apparent from the language of the exception – aggravated *circumstances*. This reading is also consistent with the ASFA’s central policy aim, protecting the health and safety of the child. As courts have already noted, “circumstances” should include the effect on the child, any neglect circumstances, and any derivative circumstances.

If the effect on the child, as opposed to the conduct of the parent, is what qualifies a circumstance as aggravated, the court ought to be able to consider the effect circumstances. As the Oregon Court of Appeals in *Risland* emphasized, “circumstances” includes “the total complex of essential attributes and attendant adjuncts,” and not only the “aggravated actions and conditions of a parent.”³⁴⁷ The same is true of ASFA’s exception.

In addition, the circumstances need not involve an affirmative act. The severe neglect circumstances in *In re Ashley*,³⁴⁸ the case in which the Maine Supreme Court affirmed a finding of aggravated circumstances, demonstrate that non-affirmative conduct can cause very serious harms.³⁴⁹

Finally, derivative circumstances should also be considered by the court when determining if aggravated circumstances exist. First, it is fair to read the plain language of

³⁴⁷ *Risland*, 51 P.3d at 705.

³⁴⁸ *In re Ashley*, 762 A.2d 941.

³⁴⁹ *See supra* text accompanying notes 252-257.

the exception – “subjected the child to aggravated circumstances”³⁵⁰ – as encompassing derivative harms. In addition, the premise of the CAPTA and TPR exceptions in ASFA is derivative harms. Conventional abuse and neglect cases have also long relied on derivative harms.³⁵¹ And last, recognizing derivative harms is consistent with protecting the health and safety of children. The court should certainly consider the very serious abuse of another child of the parent as possible aggravated circumstances.³⁵²

Allowing courts to consider any circumstances that contribute to the showing of the harm required for aggravated circumstances, along with setting the threshold of harm at “very serious,” may appear to qualify too many situations as aggravated. But these qualifications only constitute the aggravated circumstances. They do not by themselves, nor should they, justify the denial of reunification efforts. To deny reasonable efforts, the decision-maker must also be satisfied that the harm triggering the exception – the aggravated circumstance – is connected to the harm forecast to the subject-child and, further, that the forecast harm is sufficient to justify the denial. Further, these requirements should apply to all reasonable efforts exceptions, not just aggravated circumstances.

Identify the nexus between the triggering circumstances and the anticipated harm to the child before the court. For reasonable efforts to be denied, the decision-maker should be required to articulate with some specificity the link between the triggering circumstances (whether CAPTA, TPR, or aggravated) and the threat to the future health and safety of the child before the court should reunification efforts be attempted.

³⁵⁰ ASFA § 101(a), 42 U.S.C. § 671(a)(15)(D).

³⁵¹ *See, e.g.*, In re GP, 679 P.2d 976, 1008 (Wyo. 1984).

³⁵² Other derivative abuse circumstances could qualify, including circumstances where the child is “subjected” to a domestic violence situation. *See Marino Ct. App.*, 795 N.E.2d at 28-29 (noting abuse to the child could be demonstrated by showing the child “suffer[ed] damage from witnessing the severe abuse of . . . [a] nonoffending parent”).

While a threshold showing of a “very serious” harm will allow broad latitude for protecting the health and safety of children from harmful reasonable efforts, the threshold has two related weaknesses. First, while the phrase “very serious” is a bit more concrete than “aggravated circumstances,” a common and firm understanding of what it constitutes will be difficult to attain. Second, even apart from its vagueness, the broad applicability of the phrase risks inviting abuse if not restrained. This latter weakness is shared somewhat by the CAPTA criminal acts and prior TPR exceptions. While the threshold harms in those exceptions are not vague, once the exceptions are triggered, their applicability is retrained only by discretion. They offer no additional guidance on when a state should exercise this discretion to deny reunification efforts.

State courts have consistently recognized the difference between the applicability of ASFA’s exceptions and the subsequent exercise of the discretion to deny efforts.³⁵³ Along these same lines, Iowa legislatively restricts the applicability of its aggravated circumstances exception by requiring evidence that the abuse or neglect “posed a significant risk to the life of the child or constituted imminent danger to the child.”³⁵⁴ But each of the ASFA exceptions, not just the aggravated circumstances exception, should be subjected to explicit restrictions concerning the denial of reunification efforts to parents. Without some restriction, these life-altering decisions will be too susceptible to inconsistencies or worse.

Accordingly, the decision-maker must first be satisfied that the triggering circumstances for any exception are connected to the child and the decision before the

³⁵³ *E.g.*, State ex rel. Children, Youth & Families Dept. v. Amy B., 61 P.3d 845, 849 (N.M. App. 2002); *see also supra* text accompanying notes 160-162.

³⁵⁴ IOWA CODE § 232.116(1)(i) (incorporated by reference in Iowa Code § 232.57(2)(b) (Supp. 2008)).

court; the circumstances should thus forecast a threat to the future health and safety of the child should reunification efforts be attempted.

When the circumstances are directed at the child before the court, this connection is usually self-evident. Derivative circumstances differ, however, and must be connected explicitly. Some Florida courts have referred to this when discussing termination of parental rights based on the abuse of a sibling as finding a “nexus between the abuse and the prospective abuse.”³⁵⁵ In typical derivative “risk of abuse or neglect” cases, two significant factors help establish or refute this nexus. The first of these is a given – the control and physical proximity that comes from the parent-child relationship. The second significant factor is proximity in time,³⁵⁶ that is, how recent the circumstance was that triggered the exception. A third important factor will also be relevant to nexus and that is any parental change or failure to change since the triggering event.

Some Florida case law recognizes nexus is usually established “when the parent has a mental or emotional condition that will continue, such as mental illness, drug addiction, or pedophilia, and which will make it highly probable that in the future the parent will abuse or neglect another child.”³⁵⁷ A number of other factors can be relevant also, including the nature of the harm; the conduct or circumstances that resulted in the harm; the

³⁵⁵ In re G.D. 870 So.2d 235, 238 (Fla. Dist. Ct. App. 2004). Similarly, in a District of Columbia removal case. the court ruled there can be “no per se rule allowing a child to be adjudicated neglected (and thus to be removed from a home) simply because a different child within that home has been abused.” In re Kya. B., 857 A.2d 465, 472 (D.C. 2004). Instead, the court ruled, there must be “an individualized finding” for each child, justifying that child’s removal from the home. *Id.* See also In re Arthur H., 819 N.E.2d 734, 749 (Ill. 2004) (noting “there here is no *per se* rule that the neglect of one child conclusively establishes the neglect of another child in the same household”).

³⁵⁶ See *Marino Fam. Ct.*, 693 N.Y.S.2d at 831.

³⁵⁷ In re C.M., 844 So. 2d 765, 766 (Fla. Dist. Ct. App. 2003).

age, sex, health, abilities, and disabilities of the children; and the health, abilities, and disabilities of the parents.³⁵⁸

The essentials of the CAPTA criminal acts circumstances will usually satisfy a nexus requirement. Most of the time, a parent who has murdered, committed voluntary manslaughter, or committed a felony assault resulting in serious bodily injury to one of his or her own children, has demonstrated he or she is a parent with dangerous propensities who presents an undue risk to his or her other children. The nexus of control and physical proximity of the parent to the child is inherent in the anticipated reunion of parent and child if reunification efforts are attempted. Proximity of time, often relevant, is usually not a factor in these cases. A parent guilty of the murder of one of his or her children, for example, suggests a parent whose “judgment and impulse control are so defective”³⁵⁹ that passage of time is unlike to ease the state’s legitimate concern that the parent will harm other children in his or her care. Even in some CAPTA-like circumstances, though, there can be exceptions. If the murder was a shaken baby case that occurred twenty years ago, for example, and the child before the court is twelve years old and the current removal was for educational neglect,³⁶⁰ the nexus is not apparent. In these circumstances, the health and safety needs of the twelve-year-old might require reasonable efforts.

For a prior TPR exception, the nexus between the prior termination and the anticipated harm to the subject-child requires more than the fact of the prior termination of parental rights and the parent’s control of or physical access to the child. In a termination

³⁵⁸ See generally *In re C.R.*, 937 So. 2d 1257, 1262 (Fla. Dist. Ct. App. 2006); *D.P. v. Dept. of Children & Fam. Services*, 930 So. 2d 798, 801-02 (Fla. Dist. Ct. App. 3 2006).

³⁵⁹ *Marino Ct. App.*, 795 N.E.2d at 28.

³⁶⁰ See *In re B.B.*, 440 N.W.2d 594 (Iowa 1989) (child adjudicated neglected because parents failed to send him to school).

of parental rights case, the Florida Supreme Court identified various factors that might be relevant: whether the conduct that led to the TPR involved “egregious abuse or neglect”; “[t]he amount of time that has passed since the prior involuntary termination”; and “evidence of any change in circumstances since the prior involuntary termination.” The Court noted a “very recent involuntary termination will tend to indicate a greater current risk,” and that “positive life changes can overcome a negative history.”³⁶¹ Certainly circumstances of the prior TPR, of the child before the court, and of the parent then and now are likely to be relevant when assessing whether the TPR sufficiently predicts harm to the child before the court if reunification efforts are ordered.

Connecting the triggering harm with the predicted harm to the child before the court is one step. The predicted harm must also be sufficiently detrimental to the child before a denial of reasonable efforts is justified.

Articulate anticipated harm to the child. To justify the denial of reunification efforts, the state should also be required to establish a probable and substantial likelihood that the child will suffer one of the major harms ASFA sought to prevent – either a return to a dangerous home or a stay in foster care that is too long for the health and safety of the child. Both of these will require states to consider whether the parents are able and likely

³⁶¹ Dept. Of Children & Fam. v. F.L., 880 So. 2d 602, 610 (Fla. 2004). *See also Smith*, 896 A.2d at 190 (family court noting mother had not made any significant changes in her parenting skills since her prior terminations of parental rights); Kathleen Haggard, Note, *Treating Prior Terminations of Parental Rights as Grounds for Present Terminations*, 73 WASH. L. REV. 1051 (1998) (arguing a prior termination of parental rights should provide grounds for terminating the parent’s rights to the child before the court “if the State finds the parent’s continuing behavior puts the child at risk for abuse or neglect,” *id.* at 1051).

to remediate the concerns within a reasonable time.³⁶² If the parents are likely to fix the problem, the child is unlikely to suffer the anticipated harm.

If the identified threat to the child’s health or safety is a CAPTA-like harm, i.e., an instantaneous infliction of a very serious harm, reunification efforts are less likely to be successful, in large part because the risk that something very serious and irreparable might happen is just too great. Circumstances may matter, however, including the passage of time since the triggering event. If the parent appears ready to comply with a reunification plan, the court must still consider whether the current concern about the parent will linger, despite compliance with the plan. Further, the court also must consider whether the parent can complete the reunification plan within a reasonable time. Thus the court must be cognizant of not only the harm that may result if the child is returned to the home before it is safe, but also the harm that will accrue from an extended stay in foster care. Either can cause a very serious and irreparable harm to the child and either should suffice for a denial of reunification efforts. Allowing reunification efforts in CAPTA-like circumstances will often, and probably most often, create a substantial likelihood of one or the other of these two harms.

³⁶² This requirement is in line with ASFA’s provisions concerning mandatory termination of parental rights petitions. As noted, ASFA requires mandatory petitions in several circumstances, e.g., when one of the CAPTA criminal acts exceptions exists or when a child has been in foster care for 15 of the most recent 22 months. ASFA § 103(a), 42 U.S.C. § 675(5)(E). One exception to this requirement, however, is when an agency has “documented in the case plan . . . a compelling reason for determining that filing such a petition would not be in the best interests of the child.” ASFA § 103(a), 42 U.S.C. § 675(5)(E)(ii). New York has a similar provision affecting the aggravated circumstances exception. When there are aggravated circumstances, reasonable efforts are not required “unless the court determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future. The court shall state such findings in its order.” N.Y. FAM. CT. ACT, Art. 10, Part 3, §1039-b(b) (McKinney Supp. 2008). Both ultimately look to the future of the child and the child’s health and safety.

If the identified threat is one that results from on-going circumstances or actions such as chronic abuse or neglect, the success of reunification efforts may be more plausible and the risk to the child, if he or she is returned to the home, not as stark and irreparable. If the parents relapse, the child can often be removed again before a significant and irreparable harm occurs. (This observation is not meant to dismiss the harm that comes from removing the child again. It simply recognizes the importance of preserving the parent-child relationship for the child's long-term health and safety.) That the problem is chronic and that the parents may lapse is not sufficient for predicting a substantial likelihood of one of the two harms ASFA was meant to address. However, if there is a substantial likelihood that the chronic nature of the parents' problems will ultimately prevail, or a substantial likelihood that the parents will not recover within a reasonable time, this predicts a long and uncertain stay in foster care. The court does not need to determine that the situation is so bad that the family can never be fixed. The court does need to find, however, that it is substantially unlikely that the problem can be fixed within a reasonable time. If so, reunification efforts should not be provided.

The key to both of these situations is "reasonable time." ASFA has established a maximum default "reasonable time" framework by requiring a permanency plan within twelve months after the child enters foster care³⁶³ and requiring a mandatory termination of parental rights petition if the child has been in foster care for fifteen of the most recent twenty-two months.³⁶⁴ The circumstances of individual cases may, however, require longer or shorter times. States may also wish to establish specific or presumptive reasonable times based on the child's age, similar to what some states have done when

³⁶³ ASFA § 302, 42 U.S.C. § 675(5)(c).

³⁶⁴ ASFA § 103, 42 U.S.C. § 675(5)(E).

defining the duty to provide reasonable reunification efforts.³⁶⁵ If the court finds it substantially likely that the concerns will not be successfully remediated within the reasonable time and that the concerns present a very serious health or safety threat to the subject-child, however, denying reasonable efforts is appropriate.

A final caution is important. Courts often assess the likelihood of parents' successfully remediating a future threat to the subject-child's health and safety by relying, in whole or part, on the failure of the parents' prior efforts to remediate their problems. While these are circumstances appropriate to consider, the court must also consider if the state provided the parents with reasonable reunification efforts. To use the parent's failure to respond to prior efforts as a basis for concluding that successful remediation is unlikely in the future requires that the state demonstrate the reasonableness of the state's prior assistance.³⁶⁶

³⁶⁵ *E.g.*, CALIFORNIA WELF. & INST. CODE § 361.5(a)(1), (2) (2008) provides that reunification efforts for a child age three or older "shall not exceed . . . 12 months from the date the child entered foster care." For a child under three, services "shall not exceed . . . 6 months from the date the child entered foster care."

³⁶⁶ For a discussion supporting this concern, *see* Bean, *supra* note 16, at 340-43.